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U.S. Department of Justice
Antitrust Division

Antitrust Division Manual

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INTRODUCTION

This Manual is the first comprehensive guide to the operating procedures and policies of the Antitrust Division since the mid-1960's. The Manual is an effort to provide all Division professionals with a single volume explaining not only what the Division does, but how it goes about it. A large portion of the Manual is devoted to the suggested methods of conducting investigations and litigation that the Division has employed successfully in the past.

The Manual is divided into chapters and subchapters that cover specific topic areas. Chapter I is a brief description of the organization of both the Department of Justice and the Antitrust Division. Chapter II sets forth the text, or a summary, of the major statutes that the Division enforces or employs in its mission, as well as the major policy guidelines that the Division has issued.

Chapter III is a guide to the Division's procedures and practices in conducting investigations, and includes a comprehensive analysis of the premerger notification rules, the issuance of civil investigative demands, and the conduct of grand jury investigations. Chapter IV contains a guide to various problems that may develop in the course of litigation, and discusses the use of temporary restraining orders and preliminary injunctions, the civil discovery techniques employed in depositions, interrogatories and document requests, and the major areas of litigation strategy involving criminal cases. Chapter V provides a description of the Division's regulatory activities, including the philosophical and methodological basis for the Division's competition advocacy policy.

Chapter VI is a full guide to the information resources available to the investigator and litigator, and the manner in which Division professionals can make use of every available resource in structuring and planning an investigation.

Chapter VII of the Manual explains the Division's relationships with other agencies and individuals, including the Federal Trade Commission, U. S. Attorneys, state attorneys general, foreign governments, the Congress, the press and the public. It is intended to provide guidelines and useful information that ensure consistent treatment of those agencies and individuals by the Division. Finally, Chapter VIII will provide a guide to other useful materials and to a bibliography of publications that should be of interest to all in the antitrust field.

p.A

This project has been one of my objectives during my tenure as Assistant Attorney General because I believe that increasing the information available to Division personnel will improve antitrust enforcement. The Manual will also be a useful management tool, easing the communication barriers that normally exist within an organization of the Division's size and allowing for a consistent and comprehensive set of procedures and policies to be applied in most circumstances. In many ways, it is the logical culmination of our efforts to improve the management and the quality of communications within the Division. I believe it is a product that deserves thorough study by all the Division's professionals.

This project was organized, coordinated, and implemented under the direction and supervision of Donald C. Klawiter, Special Assistant in the Office of Operations. In addition, numerous other individuals provided information and assisted in this project, most notably Karen S. Lee and Melanie S. Cutler, Special Assistants to the Assistant Attorney General, Michael F. Rahill, the Division's Librarian, and attorneys in the Special Trial and General Litigation sections. The review committee, which included the Deputy Assistant Attorneys General, the Director of Operations, and other Division attorneys and economists, carefully evaluated each section of the Manual and made numerous constructive comments. The task of typing the manuscript through many drafts and the final product was done chiefly by Julia Ball, together with Marcia Wilson, Linda Buckler, and Evelyn Long.

In sum, this Manual should stand as a self-contained guide to the Division's mission and how it operates to fulfill that mission. I commend it to you.

John H. Shenefield

John H. Shenefield
Assistant Attorney General
Antitrust Division

August 27, 1979

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CHAPTER I

ORGANIZATION OF THE DEPARTMENT OF JUSTICE AND THE ANTITRUST DIVISION

I. Organization and Functions of the Department of Justice

A. Creation

The post of Attorney General of the United States was created by the Judiciary Act of September 24, 1789; however, it was created as an office, not as a department. The Attorney General was a member of the President's Cabinet and was the President's chief legal advisor. By 1870, the work of the Attorney General had expanded to such an extent that his office had become an executive department of the government. In recognition of this fact, the Congress on June 22, 1870, enacted a law (28 U.S.C. §§ 501, 503) establishing the Department of Justice with the Attorney General as its head.

B. Purpose

The Department of Justice is responsible for enforcing the law in the public interest. Through its lawyers, investigators, agents, and other personnel, the Department plays the key role in protecting society against crime and subversion, in ensuring healthy competition of business in the free enterprise system, in safeguarding the consumer, and in enforcing drug, immigration and naturalization laws. The Department also plays a significant role in protecting citizens through its efforts for effective law enforcement, crime prevention, crime detection and prosecution and rehabilitation of offenders.

The Department appears in all suits before the Supreme Court in which the United States is concerned. It represents the government in legal matters generally, rendering legal advice and opinions to the President and to the heads of the executive departments and agencies. The Attorney General supervises and directs these activities, as well as those of the United States Attorneys and the United States Marshals in the various judicial districts around the country.

C. Organization

The Attorney General serves as head of the Department of Justice and chief law officer of the federal government. He is assisted by the Deputy Attorney General and the Associate Attorney General in supervising the activities of the Department.

The Deputy Attorney General advises and assists the Attorney General in formulating and implementing Department policies and programs and in providing overall supervision and direction to all organizational units of the Department. The Deputy Attorney General is authorized to exercise all the power and authority of the Attorney General, except where such power or authority is prohibited by law from delegation or has been delegated to another official. In the absence of the Attorney General, the Deputy Attorney General acts as Attorney General. The Office also administers the attorney hiring programs of the Department.

The Associate Attorney General advises and assists the Attorney General in formulating and implementing policies and programs of the Department pertaining to criminal matters and coordinates the program activities of, and has directional authority over the head of the Criminal Division, the Immigration and Naturalization Service, the Executive Office for United States Attorneys, the offices of each of the 93 United States Attorneys, the Bureau of Prisons, the Federal Prison Industries, Inc., the Pardon Attorney, the Board of Immigration Appeals, the United States Marshals Service, and the U.S. National Central Bureau (INTERPOL). The Administrator of the Drug Enforcement Administration also reports to the Associate Attorney General. The United States Parole Commission is under the supervision of the Associate Attorney General for administrative purposes.

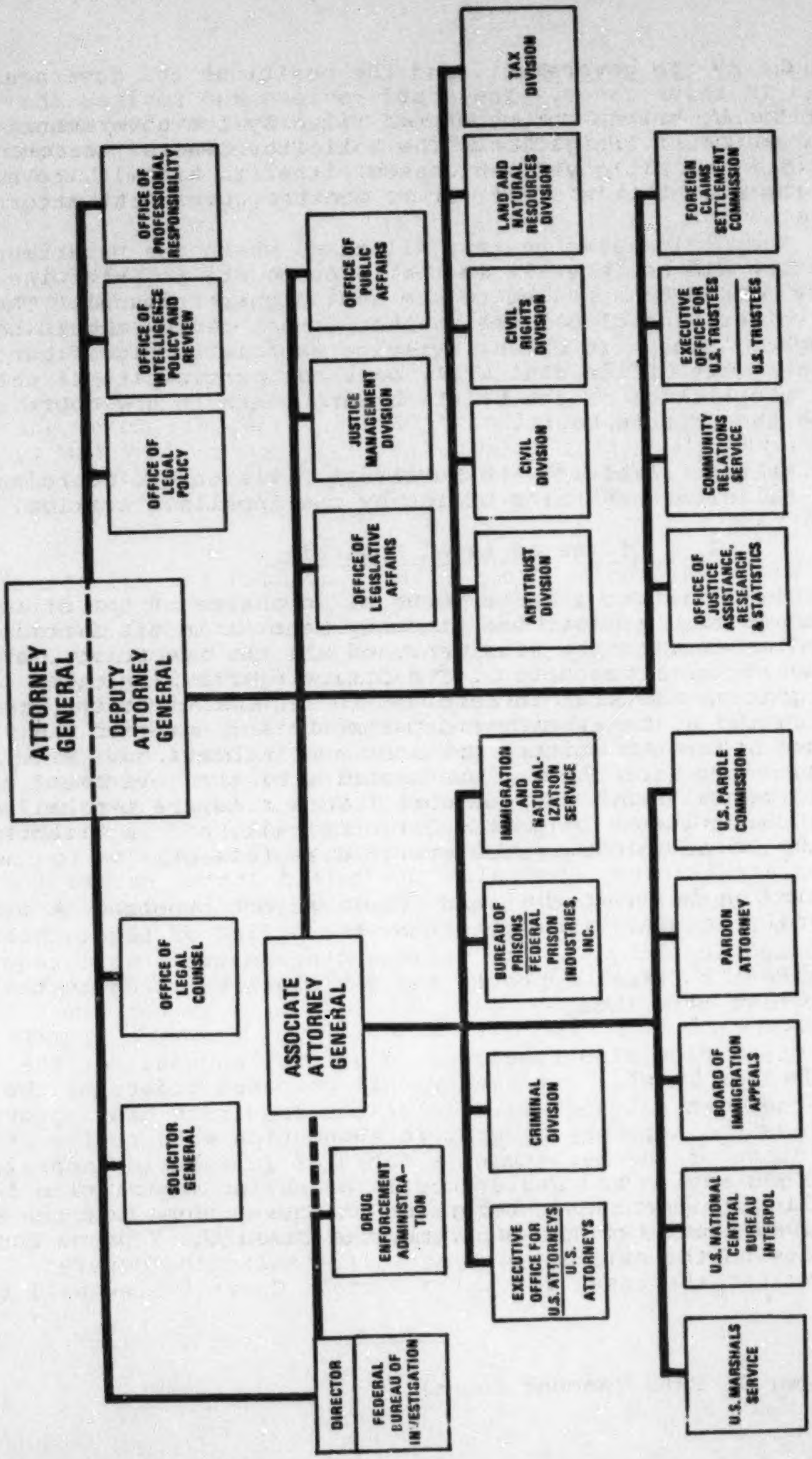
The offices, divisions, bureaus, boards and commissions of the Department are described below. The organizational structure of the Department is shown in the chart on page I-3.

D. Offices

1. Office of the Solicitor General

The major function of this Office is to supervise the handling of government litigation in the Supreme Court. This involves about two-thirds of all the cases the Supreme Court decides on the merits each year. The Solicitor General determines the cases for which Supreme Court review will be

DEPARTMENT OF JUSTICE


ATTORNEY GENERAL
DEPUTY ATTORNEY GENERAL
OFFICE OF PROFESSIONAL RESPONSIBILITY
OFFICE OF INTELLIGENCE POLICY AND REVIEW
OFFICE OF LEGAL POLICY
OFFICE OF LEGAL COUNSEL
SOLICITOR GENERAL
DIRECTOR
FEDERAL BUREAU OF INVESTIGATION
ASSOCIATE ATTORNEY GENERAL
OFFICE OF PUBLIC AFFAIRS
JUSTICE MANAGEMENT DIVISION
OFFICE OF LEGISLATIVE AFFAIRS
DRUG ENFORCEMENT ADMINISTRATION
TAX DIVISION
LAND AND NATURAL RESOURCES DIVISION
CIVIL RIGHTS DIVISION
CIVIL DIVISION
ANTITRUST DIVISION
IMMIGRATION AND NATURALIZATION SERVICE
BUREAU OF PRISONS FEDERAL PRISON INDUSTRIES, INC.
CRIMINAL DIVISION
EXECUTIVE OFFICE FOR U.S. ATTORNEYS
U.S. ATTORNEYS
FOREIGN CLAIMS SETTLEMENT COMMISSION
EXECUTIVE OFFICE FOR U.S. TRUSTEES
U.S. TRUSTEES
COMMUNITY RELATIONS SERVICE
OFFICE OF JUSTICE ASSISTANCE, RESEARCH & STATISTICS
U.S. PAROLE COMMISSION
PARDON ATTORNEY
BOARD OF IMMIGRATION APPEALS
U.S. NATIONAL CENTRAL BUREAU INTERPOL
U.S. MARSHALS SERVICE

sought by the government, and the positions the government will take in those cases. The staff reviews and revises the petitions, briefs and memoranda filed by the government in its Supreme Court litigation. The Solicitor General assigns the oral argument of all government cases either to himself, to a member of the Solicitor's staff, or to another government attorney.

The Office also reviews all cases where the Department of Justice did not prevail in the lower courts to determine whether they should be appealed to the next higher tribunal. The Solicitor General decides whether or not review should be sought. Except in cases involving especially significant policy issues, the Office ordinarily does not participate directly in the preparation of the briefs or arguments in any court other than the Supreme Court.

Matters involving the Antitrust Division are coordinated with the Solicitor General's Office by the Appellate Section.

2. Office of Legal Counsel

The Assistant Attorney General in charge of the Office of Legal Counsel assists the Attorney General in his function as legal advisor to the President and all the Executive Branch departments and agencies. The Office drafts legal opinions of the Attorney General in response to requests from the President and heads of the executive departments and agencies. It also provides its own written opinions and informal advice in response to requests from the various agencies of the government and from presidential staff and advisors. Such requests typically deal with legal issues of particular complexity and importance about which two or more agencies are in disagreement.

All executive orders and proclamations proposed to be issued by the President are reviewed by the Office of Legal Counsel for form and legality, as are various other matters that require the President's formal approval and decisions relating to the use of executive privilege.

The Office also functions as general counsel for the Department itself. It reviews all proposed orders of the Attorney General and all regulations requiring his approval, advises the Attorney General in connection with review of decisions of the Department's Board of Immigration Appeals, provides advice and assistance in preparing legislation desired by the Department, and serves as in-house counsel to the other component parts of the Department of Justice.

Finally, the Office coordinates the work of the Department with respect to treaties, executive agreements, and international organizations. It performs a variety of special assignments referred by the Attorney General, the Deputy Attorney General, or the Associate Attorney General.

3. Office of Legislative Affairs

The Office of Legislative Affairs, under the direction of an Assistant Attorney General, is assigned responsibility for conducting or coordinating the Department's contacts with Congress. The Office exercises general supervision over the Department's legislative program and responds to the numerous requests and inquiries from congressional committees, individual members and their staffs.

The functions of the Office include maintaining liaison between the Department and the Congress, reviewing and submitting Department legislative reports, coordinating the preparation of proposed Department legislation, responding to requests from congressional committees and the Office of Management and Budget for reports on bills and proposed legislation, and providing or arranging for testimony by Department witnesses at congressional hearings.

4. Office of Legal Policy

The Assistant Attorney General in charge of the Office of Legal Policy assists the Attorney General and the Deputy Attorney General in the formulation and implementation of the major policy initiatives of the Department and the administration. The Office reviews and develops legislation and other policy proposals of major concern to the Department in both the civil and criminal law areas and coordinates efforts to secure their legislative enactment or administrative implementation.

The Office also provides the primary staff support for the work of the Cabinet Council on Legal Policy, which is chaired by the Attorney General; coordinates, generally, Department of Justice participation in other Cabinet councils and interagency matters; provides advice and assistance to the Attorney General and the Deputy Attorney General regarding the appointment of Federal judges; manages and coordinates Department responsibilities under the Freedom of Information and Privacy Acts; and administers the Federal Justice Research Program, which provides contracts for research related to policy development.

5. Office of Professional Responsibility

The Office of Professional Responsibility oversees investigations of allegations of misconduct by Department employees. The head of the Office is the Counsel on Professional Responsibility who serves as a special reviewing officer and advisor to the Attorney General, Deputy Attorney General and Associate Attorney General.

The Office receives and reviews information or allegations concerning conduct by Justice Department employees that may violate the law, Department orders or regulations, or applicable standards of conduct. The Counsel is authorized to make a preliminary inquiry into such allegations.

The Counsel on Professional Responsibility recommends to the Attorney General what further action should be taken on any matter involving a violation of law, regulation, order or standard. Such action may include direct supervision of an investigation when the Attorney General considers it appropriate.

The heads of the offices, boards, divisions and bureaus make periodic reports to the Counsel on administrative matters in which their employees have been accused of misconduct. The Counsel submits to the Attorney General an annual report reviewing and evaluating the Department's various internal inspection units. The Counsel also makes recommendations to the Attorney General on the need for changes in policies or procedures that become evident during the course of the internal inquiries reviewed or initiated by the Office.

6. Executive Office for United States Attorneys and Offices of United States Attorneys

The Executive Office for United States Attorneys provides general executive assistance and supervision of the U.S. Attorney Offices and coordinates and directs the relationship of other organizational units of the Department with these offices.

There are U.S. Attorneys for each of the 95 judicial districts located throughout the United States, Puerto Rico, the Virgin Islands, the Canal Zone, Guam and the Northern Marianas. Within each district, the U.S. Attorney is the chief law enforcement representative of the Attorney General.

The U.S. Attorney enforces federal criminal law and handles most of the civil litigation in which the United States is involved. A full description of the working relationships between the U.S. Attorney Offices and the Antitrust Division is found in Chapter VII.

In addition to its traditional support and supervisory functions, the Executive Office carries out an extensive training program, primarily through the Attorney General's Advocacy Institute. The Institute's training programs are designed to sharpen trial advocacy skills and to provide continuing legal education for U.S. Attorneys and their assistants and attorneys of the Department's legal divisions, including the Antitrust Division.

7. Office of the Pardon Attorney

The Office of the Pardon Attorney, in consultation with the Associate Attorney General and Deputy Attorney General, assists the President in the exercise of Executive clemency as authorized under Article II, section 2 of the Constitution. Generally, all requests for Executive clemency are directed to the Pardon Attorney for investigation and review. Executive clemency may take several forms, including pardon, commutation (reduction of sentence), remission of fine and reprieve.

8. Office of Public Affairs

The Office of Public Affairs is responsible for the dissemination of information about the activities of the Department of Justice to the general public. This information is transmitted to the public through the news media and by responses to public inquiries. The Office serves as a focal point for the distribution of information relating to the work and activities of all components of the Department and as coordinator of departmental publications.

An Assistant Director of Public Affairs is assigned to handle Antitrust Division matters. The Assistant Director generally coordinates requests for information through the Deputy Assistant Attorneys General and the Office of Operations.

9. Community Relations Service

The Community Relations Service (CRS) was established by the 1964 Civil Rights Act to provide assistance to communities in resolving disputes, disagreements, and difficulties relating to discrimination based on race, color or national origin. The Service performs its role by employing conciliation and mediation techniques to settle differences through mutual understanding and voluntary action, rather than through coercion or court litigation. CRS offers its assistance either through its own initiative or upon request of appropriate state or local officials or other interested persons.

10. Office of Intelligence Policy and Review

The Office of Intelligence Policy and Review, under the direction of the Counsel to the Attorney General for Intelligence Policy, is responsible for advising the Attorney General on all matters relating to the intelligence activities of the United States. The Office prepares and files all applications for surveillance under the Foreign Intelligence Surveillance Act of 1978. It assists intelligence agencies in developing regulatory and legislative proposals, providing legal advice to Government agencies on intelligence law and policy, and represents the Department of Justice on interagency intelligence committees such as the National Foreign Intelligence Board.

The Office provides advice to the Attorney General and various client agencies, including the CIA, FBI, Defense and State Departments concerning the legality of proposed or existing statutes, regulations, and guidelines as well as the intelligence operations.

11. Executive Office for United States Trustees

The Bankruptcy Code, Title 11 of the United States Code, enacted into law as the Bankruptcy Reform Act of 1978 (92 Stat. 2549; 11 U.S.C. 101), established the U.S. Trustee program as a pilot effort in 10 geographic areas, encompassing 18 Federal judicial districts. The mission of the U.S. Trustees is to supervise the administration of bankruptcy cases, leaving traditional judicial functions as the sole concern of bankruptcy judges.

The U.S. Trustee is assigned functions in three of the four types of bankruptcy proceedings defined under the Code. These are: (1) proceedings under Chapter 7 in which the assets of the debtor are liquidated; (2) reorganization proceedings under Chapter 11 which provides a mechanism for rehabilitation of the business debtor; and (3) adjustment of debts of an individual with regular income under Chapter 13, pursuant to which an individual can discharge debts by arranging for payments over a period of time, usually not to exceed 36 months. The U.S. Trustee has no role in proceedings under Chapter 9, which relates to the adjustment of debts of a municipality.

Specific responsibilities of the U.S. Trustees include appointing and supervising the performance of private trustees in individual cases; appointing and convening creditors' committees in Chapter 11 corporate reorganization cases, recommending court approval of trustees or examiners in such cases as needed; ensuring that the assets involved in bankruptcy cases are protected during the administration of cases; and serving as trustee in cases where private trustees are unwilling to serve.

The Attorney General is charged with the appointment, supervision, and coordination of the U.S. Trustees and Assistant U.S. Trustees. Day-to-day policy and legal direction, coordination, and control are provided by the Director of the Executive Office for U.S. Trustees. The Executive Office also provides administrative and management support to the individual Trustee Offices and is responsible for the design and sponsorship of a comprehensive evaluation of the pilot program. The results of this evaluation will be utilized by Congress in determining whether to terminate the Trustee program in April 1984 or expand it to all Federal judicial districts.

12. Office of Justice Assistance, Research and Statistics and Related Agencies

The Office of Justice Assistance, Research and Statistics (OJARS) coordinates and provides staff support for three related agencies: the National Institute of Justice (NIJ), the Bureau of Justice Statistics (BJS), and the Office of Juvenile Justice and Delinquency Prevention (OJJDP). NIJ supports basic and applied research into crime, criminal behavior, and crime prevention; BJS provides a variety of statistical services for the criminal justice community; and OJJDP establishes policies and operates programs to deter juvenile delinquency and improve State and local juvenile justice programs.

E. Divisions

The Department of Justice has six legal divisions -- Antitrust, Civil, Civil Rights, Criminal, Land and Natural Resources, and Tax -- and an administrative division, the Justice Management Division, each of which is headed by an Assistant Attorney General.

1. Civil Division

The Civil Division is responsible for representing the United States in all types of civil proceedings except those in specialized fields that are assigned to the other divisions of the Department. The Division is responsible for suits and claims on behalf of the government, suits filed against the government, and actions for injunctive relief and judicial review brought against Cabinet members, the heads of federal agencies and other government officials. These cases comprise the general civil litigation which arises out of the commercial and governmental activities of every federal department and agency, including tort litigation based on individual activities of civilian and military personnel in the course of their government service and civil actions to enforce various federal statutes.

The Civil Division represents the United States in cases brought in all federal district courts, the U.S. Courts of Appeals, U.S. Court of Claims, and other federal courts, state courts and the courts of foreign nations. Litigation is conducted by Division attorneys, U.S. Attorneys or by foreign counsel acting under the general supervision of the Division.

2. Civil Rights Division

This Division, created by the passage of the Civil Rights Act of 1957, is responsible for enforcing federal civil rights laws and executive orders which prohibit discrimination on the basis of race, color, religion or national origin in the areas of voting, education, employment and housing, in the use of public facilities and public accommodations, and in the administration of federally assisted programs. The Division also enforces those laws that prohibit sex discrimination in employment, housing, and education.

The Division enforces criminal statutes including those prohibiting willful deprivation of constitutional rights by agencies or officials acting under color of state or federal law or through conspiracy and violent interference with federally protected activities.

The primary work of the Division involves litigation and related matters. Except for the criminal enforcement cases that are normally tried before a jury, the suits filed by the Division seek injunctive remedies.

3. Criminal Division

The Criminal Division coordinates the enforcement of all federal criminal statutes except a small number of specialized statutes assigned to other divisions. The Division's responsibility extends to overseeing criminal matters under more than 900 statutes handled in the field by the United States Attorney Offices. The Division also exercises supervision over international extradition proceedings; the enforcement of statutes, through which federal departments and agencies regulate private activity, such as those involving customs and postal violations, conservation of wildlife, and safety of workers; civil and criminal litigation arising under the immigration and nationality laws; civil penalty and forfeiture actions; offers in compromise in pending criminal cases under the federal internal revenue laws in matters relating to liquor and narcotics; and various types of civil litigation under the Controlled Substances Act; and appeals from rulings of the Administrator of the Drug Enforcement Administration.

The Division has special responsibility for coordinating enforcement activities against organized crime, from the initial direction of an investigation by one or more of the various federal investigative agencies through the handling of prosecution and appeal. For this purpose the Division maintains a number of strike forces in metropolitan areas where the influence of organized crime is greatest.

Finally, the Division is responsible for processing requests for immunity clearance for witnesses in all criminal investigations. The Division is also informed of all investigations and prosecutions by other divisions of criminal violations which are not matters specifically assigned to that division, such as perjury and obstruction of justice. (See Chapter III for the procedures followed by the Antitrust Division in notifying the Criminal Division of such matters.)

4. Land and Natural Resources Division

The Land and Natural Resources Division supervises all suits in the federal district courts, in the state courts, and in the Court of Claims relating to real property, including lands, water, and other related natural resources, and to the Outer Continental Shelf, marine resources and the protection of the environment.

The Division defends officers of the United States, handles injunction and mandamus proceedings and litigation arising from contracts whenever those matters affect the rights of the United States in the use or title of its real property, as well as suits against government officers arising out of the National Environmental Policy Act. The Division also represents the Environmental Protection Agency in suits involving judicial review of its actions.

The Division is responsible for criminal prosecutions for air, water and noise pollution, as well as criminal actions to protect the navigable waters and adjacent wetlands.

The Division is also charged with representing the interests of the United States in all civil litigation (except civil rights cases) pertaining to Indians and Indian affairs, including the defense of Indian claims against the United States.

Except as delegated to the other departments and agencies, the Division passes upon the title to all real property and interests in real property acquired by the United States by direct purchase.

5. Tax Division

The Tax Division represents the United States and its officers in civil and criminal litigation arising under the Internal Revenue laws, other than proceedings in the United States Tax Court. While the Division's primary client is the Internal Revenue Service, it also represents such agencies as the Department of Defense and the Energy Research and Development Administration in dealings with state and local tax authorities.

In criminal offenses under the internal revenue laws, the Division's responsibilities include the control and supervision of criminal proceedings and collaboration with United States Attorneys in the conduct of such proceedings in trial and appellate courts.

The Division aids the Internal Revenue Service in collecting the federal revenue, deters willful deception through prosecution of criminal offenders and establishes legal principles which will serve as nationwide guidelines to taxpayers, as well as to the Internal Revenue Service.

6. Justice Management Division

Under the direction of the Assistant Attorney General for Administration, the Justice Management Division provides assistance to senior management officials relating to basic Department policy for auditing, evaluation, budget and financial management, personnel management and training, equal opportunity programs within the Department, automatic data processing and telecommunications, security, records management, procurement, real property and material management, and for all other matters pertaining to organization, management, and administration. The Division supplies automated litigation support as required to the Department of Justice and to other Federal agencies involved in litigation. It also oversees and coordinates the implementation of a Department of Justice case management system. In addition, the Division provides direct administrative support services to the Offices, Boards, and Divisions of the Department, certain services to the U.S. Marshals Service, and operates several department-wide central services.

F. Bureaus

1. Federal Bureau of Investigation

The Federal Bureau of Investigation (FBI) is the principal investigative arm of the Department of Justice. It is charged with gathering and reporting facts, locating witnesses and compiling evidence in matters in which the federal government is, or may be, a party in interest. The FBI is charged with investigating all violations of federal laws with the exception of those which have been assigned by legislative enactment or otherwise to some other federal agency. The FBI's jurisdiction includes a wide range of responsibilities in the criminal, civil and security fields.

Cooperative services provided by the FBI for other duly authorized law enforcement agencies include fingerprint identification, laboratory services, police training, and the National Crime Information Center.

The Antitrust Division employs the FBI to assist in investigations and in special projects. The procedures employed in requesting FBI assistance are explained in Chapter III; such requests are handled through the Office of Operations.

2. Immigration and Naturalization Service

The Immigration and Naturalization Service (INS) is responsible for administering the immigration and naturalization laws relating to the admission, exclusion, deportation, and naturalization of aliens. Specifically, the Service investigates aliens to determine their admissibility into the United States; adjudicates requests of aliens for benefits under the law; guards against illegal entry into the United States; investigates, apprehends, and removes aliens who are in this country in violation of the law; and examines applications of aliens wishing to become citizens.

The Antitrust Division, through its Foreign Commerce Section, has employed the INS to establish border watches when the Division is attempting to find witnesses or defendants who are physically outside the territorial United States. Procedures for requesting INS assistance are outlined in Chapter VII.

3. Drug Enforcement Administration

The Drug Enforcement Administration (DEA) is the primary narcotics enforcement agency for the United States, as well as one of the largest regulatory bodies in the federal government, regulating the controlled substances area. In discharging its responsibilities, DEA uses enforcement activities and other initiatives in programs that are intended to reduce the supply of domestic or imported illicit drugs and to reduce the diversion of legally produced controlled substances to the illicit market.

4. Bureau of Prisons

The Bureau of Prisons is responsible for the care and custody of those persons convicted of federal crimes and sentenced by the courts to serve a period of incarceration in a federal penal institution. The Bureau oversees the operation of the Federal Prison System, consisting of correctional institutions and community treatment centers, as well as the Federal Prison Industries, a self-sustaining government corporation that provides work experience and industrial learning opportunities for the inmate population.

The National Institute of Corrections, which is authorized to carry out a program of technical assistance and training for state and local correctional personnel and others who work with offenders, also operates under the auspices of the Bureau of Prisons.

5. INTERPOL -- U.S. National Central Bureau

The United States National Central Bureau of the International Criminal Police Organization (INTERPOL) is responsible for facilitating international law enforcement cooperation on behalf of the Attorney General, pursuant to 22 U.S.C. 263a.

6. United States Marshals Service

The U.S. Marshals Service has offices in each of the judicial districts. The U.S. Marshals and their deputies serve both as officers of the federal courts and law enforcement agents of the Attorney General. The Marshals execute civil and criminal process emanating from the federal courts, disperse funds and collect fees, maintain custody and control of evidence seized pursuant to federal statutes, maintain custody of federal prisoners from the time of their arrest to their commitment or release, and transport federal prisoners pursuant to lawful writs and direction from the Bureau of Prisons. The Marshals Service also protects witnesses in organized crime matters whose lives and those of their families are jeopardized by their testimony; provides physical security for U.S. courtrooms and personal protection for federal judges, juries and attorneys; and provides law enforcement and security assistance to other federal agencies as required by the Attorney General.

G. Boards and Commissions

1. Board of Immigration Appeals

The Attorney General is charged with the administration and enforcement of the Immigration and Nationality Act of 1952 and all other laws relating to the immigration and naturalization of aliens. The Attorney General has delegated certain aspects of his power and authority for the administration and interpretation of the immigration laws to the Board of Immigration Appeals. The Board is a quasijudicial body which operates under the supervision and direction of the Attorney General and is responsible solely to him. The Board has nation-wide jurisdiction to hear appeals from decisions of the Immigration and Naturalization Service. Decisions of the Board are binding on all INS officers unless modified or overruled by the Attorney General. Board decisions are subject to judicial review in the federal courts.

2. United States Parole Commission

The Commission is an independent agency in the Department of Justice created to carry out a national parole policy. It is authorized to grant or deny an application or recommendation to parole any eligible prisoner; impose reasonable conditions on an order granting parole; modify or revoke an order paroling any eligible prisoner; and discharge from supervision and terminate the sentence prior to the expiration of this supervision. In addition, under the Landrum-Griffin Labor Act and the Employees Retirement Income Security Act of 1974, the Commission is responsible for special hearings and decisions about employment restrictions applicable to individual ex-offenders.

3. Foreign Claims Settlement Commission

The Foreign Claims Settlement Commission has jurisdiction to determine claims of United States nationals against foreign governments for losses and injuries sustained by them, pursuant to programs which may be authorized under its organic legislation. Available funds have their sources in international settlements, or liquidation of foreign assets in this country by the Departments of Justice or Treasury, and from public funds when provided by the Congress.

II. Organization and Functions of the Antitrust Division

A. Creation

The Division's organizational roots can be traced to the creation of an Assistant to the Attorney General in March 1903, to take charge of all suits under the antitrust and interstate commerce laws, and to assist the Attorney General and the Solicitor General in the conduct of the general executive work of the Department. The post was created under President Theodore Roosevelt and Attorney General Philander Knox.

With the growth of the economy and of corporate enterprise, it became evident that the Department of Justice must have its own corps of specialists in antitrust law to cope with an increasingly complex enforcement situation. Consequently, in 1933, under the administration of President Franklin D. Roosevelt and Attorney General Homer S. Cummings, the Antitrust Division was established. The Division employed 16 lawyers and had a budget of $142,000.

Harold M. Stephens was appointed the first Assistant Attorney General in charge of the Antitrust Division. Among the individuals who held that position early in the Division's existence were John Lord O'Brian, William Donovan, Robert H. Jackson, Thurmond Arnold and Tom Clark.

B. Purpose

The mission of the Antitrust Division is the promotion and maintenance of competition in the American economy. Private anticompetitive conduct is subject to criminal and civil action under the Sherman and Clayton Acts, statutes that prohibit conspiracies in restraint of trade, monopolization and anticompetitive mergers. Through participation in Executive Branch, regulatory and legislative processes the Division seeks to ensure that government action is procompetitive or not unnecessarily anticompetitive.

The primary functions and goals of the Division include:

1. General criminal and civil enforcement of the federal antitrust laws and other laws relating to the protection of competition and the prohibition of restraints of trade and monopolization, including investigations of possible violations of antitrust laws, conduct of grand jury proceedings, issuance and enforcement of civil investigative demands, and handling all litigation that arises out of such civil and criminal investigations.

2. Intervention or participation before administrative agencies functioning wholly or partly under regulatory statutes in proceedings requiring consideration of the antitrust laws or competitive policies, including such agencies as the Civil Aeronautics Board, Commodities Futures Trading Commission, Interstate Commerce Commission, Federal Communications Commission, Federal Energy Regulatory Commission, Federal Maritime Commission, Federal Reserve Board, International Trade Commission, Nuclear Regulatory Commission, and Securities and Exchange Commission, except proceedings referred to any agency by a federal court as incident to litigation being conducted under the supervision of another Division in the Department.

3. Assembling information and preparing reports required or requested by the Congress or the Attorney General as to the effect upon the maintenance and preservation of competition under the free enterprise system of various federal laws or programs.

4. Developing and presenting legislative proposals of the Department relating to the antitrust laws and competition generally and responding to requests for advice and comments on such matters from Congress and from other agencies.

5. Advising the President and the departments and agencies of the Executive Branch on competitive implications of governmental action.

In addition to these primary functions, additional functions of the Antitrust Division are codified at 28 C.F.R. §§ 0.40 and 0.41.

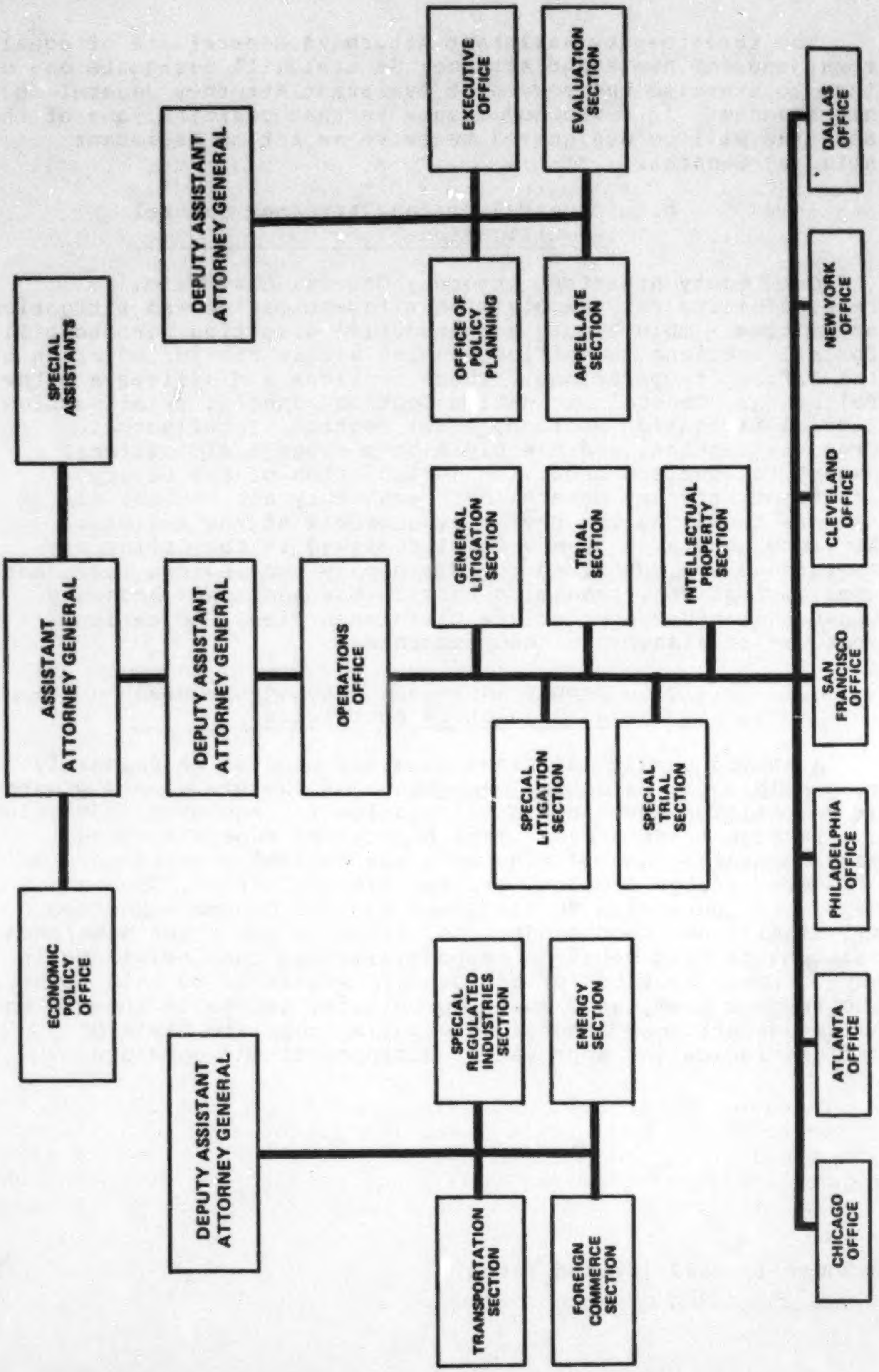
C. Organization

1. Office of the Assistant Attorney General

a. Assistant Attorney General

The Assistant Attorney General in charge of the Antitrust Division is responsible for leadership and oversight of all of the Division's programs and policies, and is the Division's chief representative. The Assistant Attorney General is assisted by three Deputy Assistant Attorneys General, the Director of Economic Policy, and the Director of Operations. The specific organizational units under the direction of each Deputy Assistant Attorney General and the Office of Operations are illustrated on the Division's organizational chart on page I-19.

ANTITRUST DIVISION


ECONOMIC POLICY OFFICE
ASSISTANT ATTORNEY GENERAL
SPECIAL ASSISTANTS
DEPUTY ASSISTANT ATTORNEY GENERAL
DEPUTY ASSISTANT ATTORNEY GENERAL
DEPUTY ASSISTANT ATTORNEY GENERAL
OPERATIONS OFFICE
TRANSPORTATION SECTION
FOREIGN COMMERCE SECTION
SPECIAL REGULATED INDUSTRIES SECTION
ENERGY SECTION
SPECIAL LITIGATION SECTION
SPECIAL TRIAL SECTION
GENERAL LITIGATION SECTION
TRIAL SECTION
INTELLECTUAL PROPERTY SECTION
OFFICE OF POLICY PLANNING
APPELLATE SECTION
EXECUTIVE OFFICE
EVALUATION SECTION
CHICAGO OFFICE
ATLANTA OFFICE
PHILADELPHIA OFFICE
SAN FRANCISCO OFFICE
CLEVELAND OFFICE
NEW YORK OFFICE
DALLAS OFFICE

The three Deputy Assistant Attorneys General are of equal rank, and the Assistant Attorney General will designate one of them to exercise the powers of Assistant Attorney General in his absence. If a vacancy occurs in that position, one of the deputies will be designated to serve as Acting Assistant Attorney General.

b. Deputy Assistant Attorney General -- Litigation

One Deputy Assistant Attorney General has basic responsibility for the Division's investigative and litigation activities. This Deputy has executive direction responsibility for all sections and offices coming within the jurisdiction of the Office of Operations. These sections and offices are the following: General Litigation Section, Special Trial Section, Special Litigation Section, Trial Section, Intellectual Property Section, and the Division's seven field offices. Except for matters under the jurisdiction of the Deputy Assistant Attorney General for regulatory activities, all matters requiring the review or approval of the Assistant Attorney General that are first reviewed in the Office of Operations are submitted to this Deputy who reviews them, and, when appropriate, transmits them to the Assistant Attorney General or other appropriate Division office, indicating approval or disapproval and comments.

c. Deputy Assistant Attorney General -- Regulatory Activities

A second Deputy Assistant Attorney General is primarily responsible for executive management of the Division's program of competition advocacy and litigation in regulated industries and foreign trade areas. This Deputy has supervisory and management responsibilities over the following sections and offices: Energy Section, Transportation Section, Special Regulated Industries Section, and Foreign Commerce Section. All significant recommendations, reports, and other memoranda relating to this Deputy's responsibilities that originate in any of these sections or offices are submitted to this Deputy, who reviews them, and, when appropriate, transmits them to the Assistant Attorney General or other appropriate Division office, indicating approval or disapproval and comments.

d. Deputy Assistant Attorney General -- Policy Planning and Legislation

A third Deputy Assistant Attorney General supervises the policy planning, legislative, appellate and administrative activities of the Division. This Deputy has responsibility for the Appellate Section, Evaluation Section, Office of Policy Planning, and the Executive Office. All significant recommendations, reports and other memoranda relating to matters that originate in any of these sections or offices are submitted to this Deputy, who reviews them and, when appropriate, transmits them to the Assistant Attorney General or other appropriate Division offices, indicating approval or disapproval and comments.

e. Special Assistants to the Assistant Attorney General

The Special Assistants to the Assistant Attorney General report directly to the Assistant Attorney General and, as directed, to the Deputies, and are responsible for assignments that encompass all areas of antitrust enforcement.

f. Economic Policy Office

The Economic Policy Office provides professional economic policy guidance to the Assistant Attorney General and assistance to Division attorneys in furthering the Division's enforcement programs and policies of competition advocacy. The principal responsibilities of the Economic Policy Office include economic analysis of policy decisions; evaluation of the competitive effects of business activities proposed for investigation; analysis of proposed acquisitions and mergers, including determination of the relevant product and geographic markets; participating in determining the Division's position in various regulatory proceedings; and providing economic and statistical expert witnesses for the Division in both litigation and regulatory proceedings.

2. Office of Operations

The Director of Operations is responsible for direct supervision of the activities of the following sections and offices: Trial Section, General Litigation Section, Special Litigation Section, Special Trial Section, Intellectual Property Section, and the seven field offices of the Division.

The Director also has direct supervisory responsibility of investigative and litigation activities of the Energy Section, Transportation Section, Special Regulated Industries Section, and the Foreign Commerce Section in the area of antitrust litigation. All pleadings, memoranda, reports and other legal documents requiring review that originate in any of these sections or offices are submitted to the Director of Operations for review and approval, and, when appropriate, for transmittal to a Deputy Assistant Attorney General and the Assistant Attorney General, or other appropriate Division office, together with the Director's approval or disapproval and comments.

The Director assigns investigations, cases and other matters to the sections or offices on the basis of the commodity or service involved, the geographical area involved, type of violation, and the availability of resources. The Director of Operations reports directly to the Deputy Assistant Attorney General for litigation and the Assistant Attorney General.

The Director is assisted by a Deputy Director of Operations; three Special Assistants who are each responsible for coordinating the activities of specific sections and field offices and other activities, as assigned, by the Director and Deputy Director.

The Office of Operations also acts as the Division's liaison with the Federal Trade Commission in its clearance procedures, coordinates the Division's responses to the State Attorneys General under Section 4(F) of the Antitrust Improvements Act of 1976, and performs other duties as assigned by the Assistant Attorney General and the Deputy Assistant Attorneys General.

3. Sections and Offices Under the Direction of the Deputy Assistant Attorney General -- Litigation

a. General Litigating Sections in Washington

The four general litigating sections in Washington -- General Litigation, Special Litigation, Special Trial and Trial -- conduct investigations and handle litigation, both civil and criminal, and negotiate, enforce, and monitor consent judgments, relating to a group of commodities and services for which each of the sections has responsibility and expertise.

Examples of the major commodity areas assigned to each of these sections include:

General Litigation -- food products, tobacco, magazine, book and newspaper publishing, advertising, motion pictures, real estate and aluminum.

Special Litigation -- office equipment, paper products, health services, medical equipment and supplies, and professional services, e.g., lawyers, accountants, and engineers.

Special Trial -- automobiles, primary metal industries, farm equipment and machinery, industrial equipment, and sports and sporting goods.

Trial -- construction materials and contractors, heavy electrical equipment, engineering supplies, household appliances, and insurance.

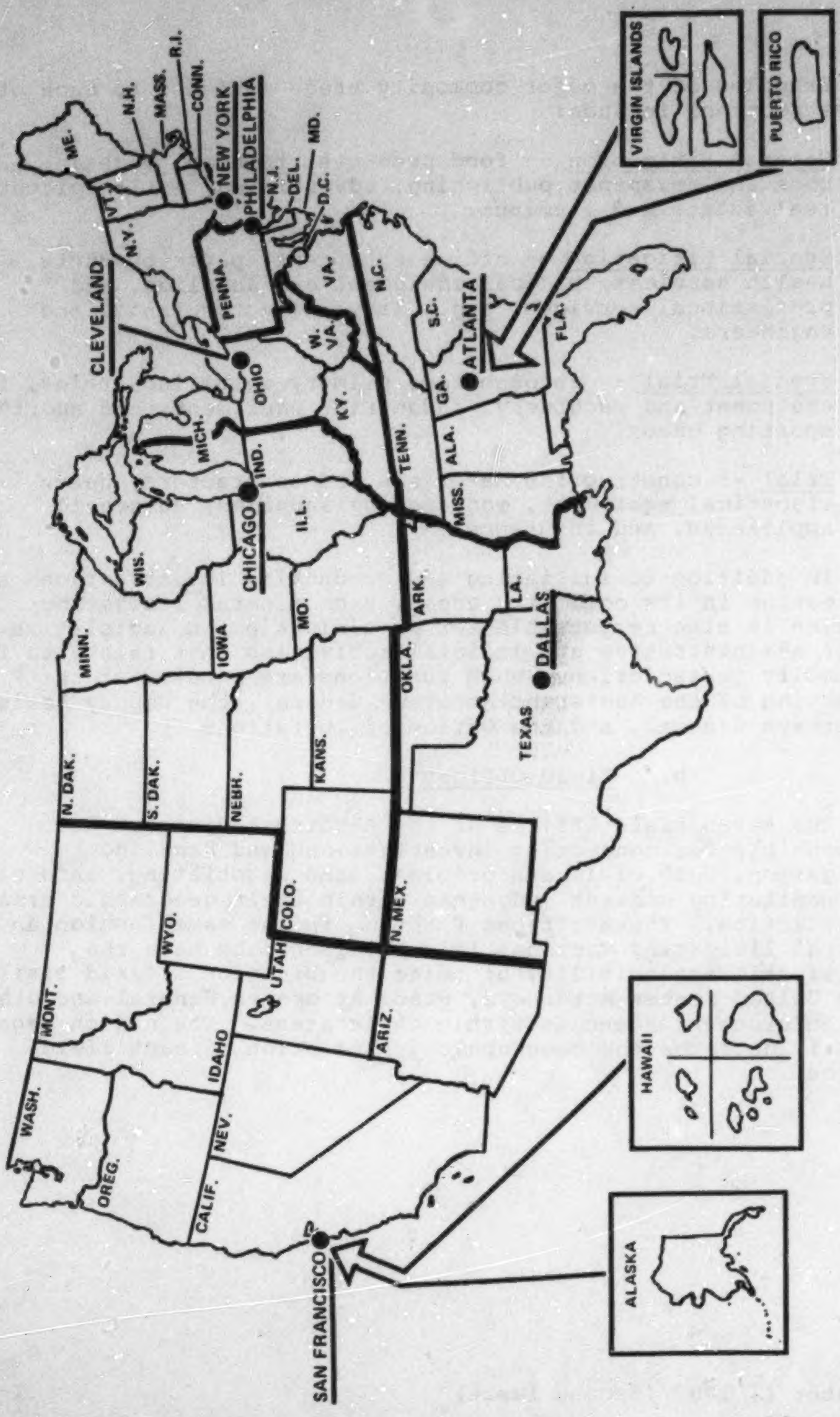
In addition to initiating and conducting investigations and litigation in its commodity areas, each general litigating section is also responsible for participating in legislative and other administrative and judicial activities that relate to its commodity jurisdiction. Such functions are handled at the direction of the Assistant Attorney General, the Deputy Assistant Attorneys General, and the Office of Operations.

b. Field Offices

The seven Field Offices of the Antitrust Division are responsible for conducting investigations and handling litigation, both civil and criminal, and negotiating, enforcing, and monitoring consent judgments within their geographic areas of jurisdiction. These offices function in the same fashion as the general litigating sections in Washington, and have the additional responsibility of being the Division's field liaison with United States Attorneys, State Attorneys General and other law enforcement agencies within their areas. The map on page I-24 illustrates the geographic jurisdiction of each Field Office.

DEPARTMENT OF JUSTICE

ANTITRUST DIVISION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UTAH
ARIZ.
MONT.
IDAHO
NEV.
WASH.
OREG.
CALIF.
SAN FRANCISCO
VIRGIN ISLANDS
PUERTO RICO
HAWAII
ALASKA

The following states are within the geographic scope of the designated Field Office:

New York: Connecticut, Maine, Massachusetts, New Hampshire, Northern New Jersey, New York, Rhode Island, and Vermont.

Middle Atlantic (Philadelphia): Delaware, Maryland, Southern New Jersey, Pennsylvania, and Virginia.

Great Lakes (Cleveland): Kentucky, Eastern District of Michigan, Ohio, and West Virginia.

Midwest (Chicago): Colorado, Illinois, Indiana, Iowa, Kansas, Western District of Michigan, Minnesota, Missouri, Nebraska, North Dakota, South Dakota, and Wisconsin.

San Francisco: Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, Utah, Washington, and Wyoming.

Atlanta: Alabama, Florida, Georgia, Mississippi, North Carolina, South Carolina, and Tennessee.

Dallas: Texas, Oklahoma, Louisiana, New Mexico, and Arkansas.

c. Intellectual Property Section

The Intellectual Property Section has jurisdiction over violations of the antitrust laws that involve patents, copyrights, trademarks and proprietary information exchange. The Section also is responsible for handling labor antitrust problems and has jurisdiction over various commodities, including pharmaceuticals, pesticides, chemicals, and hospital and laboratory equipment.

The Section's expertise is utilized in situations where the Solicitor General represents the U.S. Patent Office in cases in the Supreme Court, and in interagency task forces dealing with policy and legislative proposals on intellectual property issues, such as industrial innovation, government patent policy, compulsory licensing of patents, and standards making.

4. Sections Under the Direction of the Deputy Assistant Attorney General -- Regulatory Activities

a. Energy Section

The Energy Section has responsibility for the enforcement of the antitrust laws and the promotion of competition in various areas of energy production and use, including domestic and international petroleum, natural gas, coal, nuclear power, solar and other forms of renewable energy, electric utilities and various areas of energy regulation. The Section participates in proceedings before the Federal Energy Regulatory Commission, the Nuclear Regulatory Commission, and the Environmental Protection Agency. The Section also advises the Department of the Interior concerning the sale and lease of federal lands bearing oil and gas and coal reserves, and on related policy issues.

The Section participates in: preparation of legislation and testimony before Congress; preparation of various reports to the Congress, including an annual report on competition in the coal industry, and a biannual report on the activities of the International Energy Agency; and, special projects in conjunction with Executive Branch activities involving energy policy matters.

The Energy Section is responsible for review of merger transactions in the energy sector. It also investigates and litigates civil and criminal violations of the antitrust laws involving energy and energy related matters, and negotiates and enforces resulting consent judgments.

b. Transportation Section

The Transportation Section is responsible for the enforcement of the antitrust laws and competition advocacy related to motor, rail, water and air transportation. The Section participates in proceedings before agencies such as the Civil Aeronautics Board, Federal Maritime Commission, and Interstate Commerce Commission.

The Section is active in legislative activities relating to the deregulation of various transportation industries, and reports to Congress and the Executive Branch on specific matters on which the Division's views are sought or where the Division believes its views should be stated. The Section is also responsible for matters relating to surplus property disposal and alien property.

The Section investigates and litigates civil and criminal antitrust matters involving the transportation industry, and negotiates and enforces resulting consent judgments.

c. Special Regulated Industries Section

The Special Regulated Industries Section is responsible for the enforcement of the antitrust laws and competition advocacy in the banking, finance, securities and communications industries. The Section participates in proceedings before the Federal Reserve Board, Federal Home Loan Bank Board, Federal Deposit Insurance Corporation, Office of the Comptroller of the Currency, National Credit Union Administration, Securities and Exchange Commission, Commodities Futures Trading Commission, Federal Communications Commission and the Postal Rate Commission.

The Section also investigates and litigates violations of the antitrust laws within the banking, finance, securities and communications areas that are not the subject of regulatory controls, and negotiates and enforces resulting consent judgments.

d. Foreign Commerce Section

The Foreign Commerce Section is primarily responsible for investigating and litigating violations of the antitrust laws relating to United States foreign trade, and negotiating and monitoring consent judgments. The Section also is active in the interagency process of administering the trade laws, and participates in regulatory agency proceedings before the International Trade Commission. The Section handles the Division's relationship and cooperation with international organizations and foreign antitrust enforcement agencies. The Section coordinates the Division's duties under the Export Trading Company Act of 1982, and processes many of the Export Trade Certificate applications received pursuant to that Act.

The Section, in conjunction with the Department of State, exchanges information between the Department and foreign governments concerning investigations and cases that the Division initiates involving foreign corporations and nationals. The Division's activities regarding international organizations and notification procedures are more fully described in Chapter VII.

5. Sections and Offices that Report to the Deputy Assistant Attorney General -- Policy Planning and Legislation

a. Appellate Section

The Appellate Section represents the Division in all appeals to United States Courts of Appeals and, in conjunction with the Solicitor General's Office, all appeals before the United States Supreme Court. This responsibility includes filing amicus briefs in selected private antitrust cases and in other cases where the Division's competition advocacy is considered necessary.

In addition to antitrust matters, the Section represents the United States as statutory respondent in proceedings to review orders of several federal agencies, such as the Interstate Commerce Commission and the Federal Communications Commission.

Procedures relating to appeals in which the Division is involved, or may have an interest, are described in Chapter IV.

b. Evaluation Section

The Evaluation Section is responsible for providing staff analysis of complex antitrust matters and for the development, submission to Congress and support of the Division's legislative program. The Section is involved in a broad spectrum of activities, including conducting studies and making recommendations relating to Division enforcement policies; reviewing investigations and case recommendations for legal and policy considerations; and developing and researching legislative matters that are of interest to the Division. The Section's Legislative Unit is primarily responsible for coordinating the Division's relations with Congress and for responding to congressional requests and inquiries of the Division.

c. Office of Policy Planning

The Office of Policy Planning undertakes projects of special interest to the Assistant Attorney General and develops policies for effective utilization of Division resources. The Office also assists the Division's management and operating sections in developing and implementing new or revised Division programs.

d. Executive Office

The Executive Office provides budget, management, administrative services, personnel administration and information systems support to the Division's sections and offices.

The specific responsibilities and services of the Executive Office are set forth in the Antitrust Division Directives Manual.

6. Other Division Services and Units

In addition to the sections and offices of the Division, there are a number of units within the Division that chiefly perform service functions of the Division. Most of these units are described in greater detail in Chapters VI and VII of the Manual; however, a general description of their functions is here presented.

a. Legal Procedure Unit

The Legal Procedure Unit is under the direct supervision of the Office of Operations. The Unit handles all Freedom of Information and Privacy Act matters, and as such, receives, evaluates, and processes all Freedom of Information Act and Privacy Act requests made of the Antitrust Division. It also assists in the preparation of materials for State Attorneys General under Section 4F of the Antitrust Improvements Act of 1976.

The Legal Procedure Unit also keeps all Division litigation pleading files, files relating to grand juries and civil investigative demands, regulatory filings, and other information such as speeches by Division officers, publications of the Division, and the exemplar and work product files. The Unit has responsibility for maintaining information regarding Division business reviews and information on Division consent decrees. A full description of the Legal Procedure Unit may be found in Chapter VI.

b. Corporate Finance Unit

The Corporate Finance Unit provides Division personnel with assistance and opinions on the financial condition and resources of corporations and other entities and persons that are directly relevant to Division investigations and cases. A description of the procedures for obtaining the services of the Unit is found in Chapter VI.

c. Information Systems Support Group

The Information Systems Support Group (ISSG) is part of the Executive Office. ISSG provides Division attorneys, economists and other personnel with technical expertise and assistance in information management and retrieval and automated data processing support for litigation, economic analysis, research and internal management functions. ISSG is also responsible for the Division's word processing organization and management. Chapter VI contains a description of ISSG services.

d. Antitrust Division Library System

The Division's library system is composed of three Washington libraries and seven field office libraries. The library system works in conjunction with the Department of Justice Main Library. Requests for specific information are made to the Division Librarian. Chapter VI details the types of information found in the Library and the framework for conducting research projects as part of an antitrust investigation or case.

* * * * *

Other services of the Antitrust Division are described at length in other Chapters of this Manual. Information services and liaison procedures with other agencies and organizations that will assist Division attorneys, paralegals, economists, and support personnel are described in Chapters VI and VII.

CHAPTER II

STATUTORY PROVISIONS AND GUIDELINES OF THE ANTITRUST DIVISION

This Chapter sets forth the statutes which the Antitrust Division enforces, as well as those which affect the Division's enforcement policies. The Chapter also sets forth the text of the Division's Merger Guidelines and Sentencing Guidelines.

This Chapter is divided into five sections. Section I is a guide to the statutory provisions set forth or summarized in this chapter, as well as a cross-index to the statutes by United States Code section and popular name.

Section II includes the text of the major substantive and procedural statutes which the Division enforces. Section III sets forth the text of the criminal statutes that may also be enforced by the Division, or that affect the Division's criminal enforcement responsibilities.

Section IV summarizes statutes that affect the Division's competition advocacy policy in regulatory and agency provisions, as well as the various antitrust immunities. Section V of this Chapter sets out the text of the Merger Guidelines and the Sentencing Guidelines.

The Chapter will be a handy guide to commonly used statutes and a reference to other statutes that are significant to the Division's enforcement responsibilities.

I. STATUTORY REFERENCES

This Section provides a convenient cross-reference to the statutes enforced by the Antitrust Division and those that affect the Division's competition advocacy.

The statutes are listed by popular name, United States Code reference, and the page number of this Chapter where each appears.

The following is a description of the statutes set out in full text in Section II of this Chapter:

A. The Sherman Antitrust Act (15 U.S.C. §§ 1-8)

Statute	U.S.C. Citation	Page
§ 1 Trusts in Restraint of Trade	15 U.S.C. § 1	II-9
§ 2 Monopolization	15 U.S.C. § 2	II-9
§ 3 Trusts in Territories or the District of Columbia	15 U.S.C. § 3	II-9
§ 4 Jurisdiction of Courts	15 U.S.C. § 4	II-10
§ 5 Bringing in Additional Parties	15 U.S.C. § 5	II-10
§ 6 Forfeiture of Property in Transit	15 U.S.C. § 6	II-10
§ 7 Foreign Trade Antitrust Improvements Act of 1982	15 U.S.C. § 6a	II-11
§ 8 "Person" Defined	15 U.S.C. § 7	II-11

B. The Clayton Antitrust Act (15 U.S.C. §§ 12, 14-27)

Statute	U.S.C. Citation	Page
§ 1 Words Defined	15 U.S.C. § 12	II-12
§ 3 Sale, etc., on Agreement not to use Goods of Competitor	15 U.S.C. § 14	II-13
§ 4 Suits by Persons Injured	15 U.S.C. § 15	II-13
§ 4A Suits by United States	15 U.S.C. § 15a	II-15
§ 4B Limitation of Actions	15 U.S.C. § 15b	II-16
§ 4C Actions by State Attorneys General--Parens Patriae	15 U.S.C. § 15c	II-16
§ 4D Measurement of Damages	15 U.S.C. § 15d	II-18
§ 4E Distribution of Damages	15 U.S.C. § 15e	II-18
§ 4F Actions by Attorney General to Obtain Information	15 U.S.C. § 15f	II-19
§ 4G Definitions	15 U.S.C. § 15g	II-19
§ 4H Applicability of Parens Patriae Actions	15 U.S.C. § 15h	II-20
§ 5 Judgments--Prima Facie Evidence, Consent Judgments and Competitive Impact Statements	15 U.S.C. § 16	II-20
§ 6 Antitrust Laws not Applicable to Labor Organizations	15 U.S.C. § 17	II-24
§ 7 Acquisition by One Corporation of Stock of Another	15 U.S.C. § 18	II-25

Statute	U.S.C. Citation	Page
§ 7A Premerger Notification and Waiting Period--Filing	15 U.S.C. § 18a(a)	II-26
-- Waiting Period; Publication; Voting Securities	15 U.S.C. § 18a(b)	II-27
-- Exempt Transactions	15 U.S.C. § 18a(c)	II-28
-- Commission Rules	15 U.S.C. § 18a(d)	II-29
-- Additional Information; Waiting Period Extensions	15 U.S.C. § 18a(e)	II-30
-- Preliminary Injunctions; Hearings	15 U.S.C. § 18a(f)	II-31
-- Civil Penalty; Compliance; Power of Court	15 U.S.C. § 18a(g)	II-31
-- Disclosure Exemption	15 U.S.C. § 18a(h)	II-32
-- Construction with Other Laws	15 U.S.C. § 18a(i)	II-32
-- Report to Congress; Legislative Recommendations	15 U.S.C. § 18a(j)	II-33
§ 8 Interlocking Directorates and Officers	15 U.S.C. § 19	II-33
§ 10 Purchases by Common Carriers in Case of Interlocking Directorates, etc.	15 U.S.C. § 20	II-35
§ 11 Enforcement Provisions--Commissions and Boards Authorized to Enforce Compliance	15 U.S.C. § 21(a)	II-36
Issuance of Complaints for Violations, etc.	15 U.S.C. § 21(b)	II-37
Review of Orders; Jurisdiction; Filing of Petition and Record of Proceeding, etc.	15 U.S.C. § 21(c)	II-38
Exclusive Jurisdiction of Court of Appeals	15 U.S.C. § 21(d)	II-39
Preference; Liability Under Antitrust Laws	15 U.S.C. § 21(e)	II-39
Service of Complaints; Orders and Other Processes	15 U.S.C. § 21(f)	II-39
Finality of Orders Generally	15 U.S.C. § 21(g)	II-40
Finality of Orders Modified by Supreme Court	15 U.S.C. § 21(h)	II-40
Finality of Orders Modified by Court of Appeals	15 U.S.C. § 21(i)	II-40
Finality of Orders Issued on Rehearing Ordered by Court of Appeals or Supreme Court	15 U.S.C. § 21(j)	II-41
Definition of Mandate	15 U.S.C. § 21(k)	II-41
Penalties	15 U.S.C. § 21(l)	II-41

Statute	U.S.C. Citation	Page
§ 12 District in Which to Sue Corporation	15 U.S.C. § 22	II-42
§ 13 Suits by United States; Subpoenas for Witnesses	15 U.S.C. § 23	II-42
§ 14 Liability of Directors and Agents of Corporation	15 U.S.C. § 24	II-42
§ 15 Restraining Violations; Procedure	15 U.S.C. § 25	II-42
§ 16 Injunctive Relief for Private Parties; Exception	15 U.S.C. § 26	II-43
§ 26 Restrictions on the Purchase of Gasohol and Synthetic Motor Fuel; etc.	15 U.S.C. § 26a	II-44
§ 27 Effect of Partial Invalidity	15 U.S.C. § 27	II-46

C. Expediting Act (§§ 4-5, 15 U.S.C. §§ 28-29)

Statute	U.S.C. Citation	Page
§ 4 Expedition of Actions by United States Involving General Public Importance	15 U.S.C. § 28	II-46
§ 5 Appeals--Court of Appeals; Review by Supreme Court	15 U.S.C. § 29(a)	II-46
Direct Appeals to Supreme Court	15 U.S.C. § 29(b)	II-47

D. Antitrust Civil Process Act (§§ 101-104, 15 U.S.C. §§ 1311-1314)

Statute	U.S.C. Citation	Page
§ 101 Definitions	15 U.S.C. § 1311	II-47
§ 102 Civil Investigative Demands		
-- Issuance; Service; Production of Material; Testimony	15 U.S.C. § 1312(a)	II-49
-- Contents; Return Date for Demand for Product of Discovery	15 U.S.C. § 1312(b)	II-49
-- Protected Material or Information; etc.	15 U.S.C. § 1312(c)	II-50
-- Service; Jurisdiction	15 U.S.C. § 1312(d)	II-51
-- Service Upon Legal Entities and Natural Persons	15 U.S.C. § 1312(e)	II-52
-- Proof of Service	15 U.S.C. § 1312(f)	II-53
-- Sworn Certificates	15 U.S.C. § 1312(g)	II-53
-- Interrogatories	15 U.S.C. § 1312(h)	II-53
-- Oral Examinations	15 U.S.C. § 1312(i)	II-53

Statute	U.S.C. Citation	Page
§ 103 Custodian of Documents, Answers and Transcripts	15 U.S.C. § 1313(a)	II-55
-- Production of Materials	15 U.S.C. § 1313(b)	II-56
-- Responsibility for Materials; Disclosure	15 U.S.C. § 1313(c)	II-56
-- Use of Investigative Files	15 U.S.C. § 1313(d)	II-57
-- Return of Material to Producer	15 U.S.C. § 1313(e)	II-57
-- Appointment of Successor Custodians	15 U.S.C. § 1313(f)	II-58
§ 104 Judicial Proceedings		
-- Petition for Enforcement; Venue	15 U.S.C. § 1314(a)	II-59
-- Petition for Order Modifying or Setting Aside Demand; Time for Petition; Suspension of Time Allowed for Compliance with Demand During Pendency of Petition; Grounds for Relief	15 U.S.C. § 1314(b)	II-59
-- Petition for Order Modifying or Setting Aside Demand for Production of Product of Discovery; etc.	15 U.S.C. § 1314(c)	II-60
-- Petition for Order Requiring Performance by Custodian of Duties; Venue	15 U.S.C. § 1314(d)	II-60
-- Jurisdiction; Appeal; Contempts	15 U.S.C. § 1314(e)	II-61
-- Applicability of Federal Rules of Civil Procedure	15 U.S.C. § 1314(f)	II-61
-- Disclosure Exemption	15 U.S.C. § 1314(g)	II-61

E. False Claims Act (31 U.S.C. §§ 231-233, 235)

Statute	U.S.C. Citation	Page
§ 231 Liability of Persons Making False Claims	31 U.S.C. § 231	II-62
§ 232 Same; Suits; Procedure	31 U.S.C. § 232	II-63
§ 233 Duty of United States Attorney as to Such Cases	31 U.S.C. § 233	II-65
§ 235 Limitation of Suit	31 U.S.C. § 235	II-65

F. Counsel's Liability For Excessive Costs (28 U.S.C. § 1927) II-65

The following is a description of the criminal statutes affecting antitrust enforcement that are set out in full text in Section III of this Chapter:

Statute	U.S.C. Citation	Page
Conspiracy to Commit Offense or to Defraud United States	18 U.S.C. § 371	II-66
False Statements	18 U.S.C. § 1001	II-67
Mail Fraud	18 U.S.C. § 1341	II-67
Wire Fraud	18 U.S.C. § 1343	II-67
Obstruction of Justice	18 U.S.C. § 1503	II-68
Obstruction of Proceedings Under the Civil Process Act	18 U.S.C. § 1505	II-68
Obstruction of Criminal Investigations	18 U.S.C. § 1510	II-69
Perjury Generally	18 U.S.C. § 1621	II-70
False Declarations Before Grand Jury or Court	18 U.S.C. § 1623	II-70
Organized Crime Control Act, § 201(a)	18 U.S.C. § 6001	II-71
Immunity Generally	18 U.S.C. § 6002	II-72
Court and Grand Jury Proceedings	18 U.S.C. § 6003	II-73

The following is a description of the statutes set forth in Section IV of this Chapter:

A. Statutes Relating to Antitrust Immunities

1. Agricultural Immunities

Section 6 Clayton Act	15 U.S.C. § 17	II-74
Capper-Volstead Act	7 U.S.C. § 291	II-74
Agricultural Cooperative Marketing Act of 1926	7 U.S.C. § 455	II-74
Agricultural Adjustment Act of 1935	7 U.S.C. § 608	II-74

2. Export Trade Immunities

Export Trading Company Act of 1982	15 U.S.C. § 4000	II-75
Webb-Pomerene Export Trade Association Act	15 U.S.C. §§ 61-65	II-76

3. Insurance Immunities

McCarran-Ferguson Act	15 U.S.C. § 1011	II-76
Merchant Marine Act of 1920	46 U.S.C. § 885	II-76

Statute	U.S.C. Citation	Page
4. Labor Immunities		
Section 6 Clayton Act	15 U.S.C. § 17	II-76
Norris-LaGuardia Act of 1932	29 U.S.C. §§ 102, 104-105	II-76
5. Fishing Immunities		
Fishermen's Collective Marketing Act	15 U.S.C. §§ 521-522	II-77
6. Defense Preparedness		
Defense Production Act of 1950	50 U.S.C. App. § 2158	II-77
7. Newspaper Joint Operating Arrangements		
Newspaper Preservation Act of 1970	15 U.S.C. §§ 1801-1804	II-77
8. Professional Sports		
Sports Broadcasting Act of 1961	15 U.S.C. §§ 1291-1295	II-77
9. Small Business Joint Ventures		
Small Business Act	15 U.S.C. §§ 638-640	II-78

B. Statutes Relating to the Regulated Industries Competition Advocacy Activities of the Antitrust Division

Statute	U.S.C. Citation	Page
1. Banking		
Bank Merger Act	12 U.S.C. § 1828	II-78
Bank Holding Company Act	12 U.S.C. § 1841	II-78
Federal Deposit Insurance Act	12 U.S.C. § 1828	II-79
2. Communications		
Communications Act of 1934	47 U.S.C. § 151	II-79

Statute	U.S.C. Citation	Page
3. Foreign Trade		
Section 337 of the Tariff Act of 1930	19 U.S.C. § 1337	II-79
Sections 201, 301 and 406 of the Trade Act of 1974	19 U.S.C. §§ 2251, 2411, 2436	II-80
Section 232 of the Trade Expansion Act of 1962	19 U.S.C. § 1862	II-80
Wilson Tariff Act	15 U.S.C. §§ 8-11	II-81
4. Energy		
Department of Energy Organization Act	42 U.S.C. § 7101	II-81
Atomic Energy Act of 1954	42 U.S.C. § 2135	II-81
Deepwater Port Act of 1974	33 U.S.C. § 1506(a)	II-81
Energy Policy and Conservation Act of 1975	42 U.S.C. § 6272	II-82
Federal Coal Leasing Amendments Act of 1976	30 U.S.C. § 181	II-82
Outer Continental Shelf Lands Act	43 U.S.C. § 1331	II-82
Naval Petroleum Reserves	10 U.S.C. § 7430 (g-i)	II-82
Naval Petroleum Reserves Production Act of 1976	42 U.S.C. § 6504(d)	II-83
5. Transportation		
Interstate Commerce Act	49 U.S.C. § 81	II-83
Federal Aviation Act	49 U.S.C. §§ 1378-1384	II-83
Countervailing Duties	19 U.S.C. § 1671	II-84
Antidumping	19 U.S.C. § 1673	II-84
Shipping Act of 1916	46 U.S.C. §§ 813-814	II-84
Federal Property and Administrative Services Act	40 U.S.C. § 488	II-85
Merger Guidelines		II-87
Sentencing Recommendation Guidelines		II-118

II. STATUTES ENFORCED BY THE ANTITRUST DIVISION

A. THE SHERMAN ANTITRUST ACT (15 U.S.C. SS 1-8)

§ 1 Sherman Act, 15 U.S.C. § 1

Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

§ 2 Sherman Act, 15 U.S.C. § 2

Monopolizing trade a felony; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

§ 3 Sherman Act, 15 U.S.C. § 3

Trusts in Territories or District of Columbia illegal; combination a felony

Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

§ 4 Sherman Act, 15 U.S.C. § 4

Jurisdiction of courts; duty of United States attorneys; procedure

The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of sections 1 to 7 of this title; and it shall be the duty of the several United States attorneys, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises.

§ 5 Sherman Act, 15 U.S.C. § 5

Bringing in additional parties

Whenever it shall appear to the court before which any proceeding under section 4 of this title may be pending, that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned, whether they reside in the district in which the court is held or not; and subpoenas to that end may be served in any district by the marshal thereof.

§ 6 Sherman Act, 15 U.S.C. § 6

Forfeiture of property in transit

Any property owned under any contract or by any combination, or pursuant to any conspiracy (and being the subject thereof) mentioned in section 1 of this title, and being in the course of transportation from one State to another, or to a foreign country, shall be forfeited to the United States, and may be seized and condemned by like proceedings as those provided by law for the forfeiture, seizure, and condemnation of property imported into the United States contrary to law.

§ 7 Sherman Act, 15 U.S.C. § 6a

Foreign Trade Antitrust Improvements Act of 1982

This Act shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless--

(1) such conduct has a direct, substantial, and reasonably foreseeable effect--

(A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or

(B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and

(2) such effect gives rise to a claim under the provisions of this Act, other than this section.

If this Act applies to such conduct only because of the operation of paragraph (1)(B), then this Act shall apply to such conduct only for injury to export business in the United States.

§ 8 Sherman Act, 15 U.S.C. § 7

"Person" defined

The word "person," or "persons," wherever used in sections 1 to 7 of this title shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.

[15 U.S.C. § 6a approved October 8, 1982]

B. THE CLAYTON ANTITRUST ACT (15 U.S.C. §§ 12, 14-27)

§ 1 Clayton Act, 15 U.S.C. § 12

Words defined; short title

(a) "Antitrust laws," as used herein, includes the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," approved July second, eighteen hundred and ninety; sections seventy-three to seventy-seven, inclusive, of an Act entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes," of August twenty-seventh, eighteen hundred and ninety-four; an Act entitled "An Act to amend sections seventy-three and seventy-six of the Act of August twenty-seventh, eighteen hundred and ninety-four, entitled 'An Act to reduce taxation, to provide revenue for the Government, and for other purposes,'" approved February twelfth, nineteen hundred and thirteen; and also this Act.

"Commerce," as used herein, means trade or commerce among the several States and with foreign nations, or between the District of Columbia or any Territory of the United States and any State, Territory, or foreign nation, or between any insular possessions or other places under the jurisdiction of the United States, or between any such possession or place and any State or Territory of the United States or the District of Columbia or any foreign nation, or within the District of Columbia or any Territory or any insular possession or other places under the jurisdiction of the United States: Provided, That nothing in this Act contained shall apply to the Philippine Islands.

The word "person" or "persons" wherever used in this Act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.

(b) This Act may be cited as the "Clayton Act".

§ 3 Clayton Act, 15 U.S.C. § 14

Sale, etc., on agreement not to use goods of competitor

It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

§ 4 Clayton Act, 15 U.S.C. § 15

Suits by persons injured; amount of recovery; prejudgment interest

(a) Except as provided in subsection (b), any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. The court may award under this section, pursuant to a motion by such person promptly made, simple interest on actual damages for the period beginning on the date of service of such person's pleading setting forth a claim under the antitrust laws and ending on the date of judgment, or for any shorter period therein, if the court finds that the award of such interest for such period is just in the circumstances. In determining whether an award of interest under this section for any period is just in the circumstances, the court shall consider only--

[15 U.S.C. § 15 revised December 29, 1982]

(1) whether such person or the opposing party, or either party's representative made motions or asserted claims or defenses so lacking in merit as to show that such party or representative acted intentionally for delay, or otherwise acted in bad faith;

(2) whether, in the course of the action involved such person or the opposing party, or either party's representative, violated any applicable rule, statute, or court order providing for sanctions for dilatory behavior or otherwise providing for expeditious proceedings; and

(3) whether such person or the opposing party, or either party's representative, engaged in conduct primarily for the purpose of delaying the litigation or increasing the cost thereof.

(b)(1) Except as provided in paragraph (2), any person who is a foreign state may not recover under subsection (a) an amount in excess of the actual damages sustained by it and the cost of suit, including a reasonable attorney's fee.

(2) Paragraph (1) shall not apply to a foreign state if--

(A) such foreign state would be denied, under section 1605(a)(2) of title 28 of the United States Code, immunity in a case in which the action is based upon commercial activity, or an act, that is the subject matter of its claim under this section;

(B) such foreign state waives all defenses based upon or arising out of its status as a foreign state, to any claims brought against it in the same action;

(C) such foreign state engages primarily in commercial activities; and

(D) such foreign state does not function, with respect to the commercial activity, or the act, that is the subject matter of its claim under this section as a procurement entity for itself or for another foreign state.

(c) For purposes of this section--

(1) the term "commercial activity" shall have the meaning given it in section 1603(d) of title 28, United States Code, and

(2) the term "foreign state" shall have the meaning given it in section 1603(a) of title 28, United States Code.

§ 4A Clayton Act, 15 U.S.C. § 15a

Suits by United States; amount of recovery; prejudgment interest

Whenever the United States is hereafter injured in its business or property by reason of anything forbidden in the antitrust laws it may sue therefor in the United States district court for the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover actual damages by it sustained and the cost of suit. The court may award under this section, pursuant to a motion by the United States promptly made, simple interest on actual damages for the period beginning on the date of service of the pleading of the United States setting forth a claim under the antitrust laws and ending on the date of judgment, or for any shorter period therein, if the court finds that the award of such interest for such period is just in the circumstances. In determining whether an award of interest under this section for any period is just in the circumstances, the court shall consider only--

(1) whether the United States or the opposing party, or either party's representative, made motions or asserted claims or defenses so lacking in merit as to show that such party or representative acted intentionally for delay or otherwise acted in bad faith;

(2) whether, in the course of the action involved, the United States or the opposing party, or either party's representative, violated any applicable rule, statute, or court order providing for sanctions for dilatory behavior or otherwise providing for expeditious proceedings;

(3) whether the United States or the opposing party, or either party's representative, engaged in conduct primarily for the purpose of delaying the litigation or increasing the cost thereof; and

(4) whether the award of such interest is necessary to compensate the United States adequately for the injury sustained by the United States.

§ 4B Clayton Act, 15 U.S.C. § 15b

Limitation of actions

Any action to enforce any cause of action under sections 15, 15a, or 15c of this title shall be forever barred unless commenced within four years after the cause of action accrued. No cause of action barred under existing law on the effective date of this section and sections 15a and 16 of this title shall be revived by said sections.

§ 4C Clayton Act, 15 U.S.C. § 15c

Actions by State attorneys general--Parens patriae; monetary relief; damages; prejudgment interest

(a)(1) Any attorney general of a State may bring a civil action in the name of such State, as parens patriae on behalf of natural persons residing in such State, in any district court of the United States having jurisdiction of the defendant, to secure monetary relief as provided in this section for injury sustained by such natural persons to their property by reason of any violation of Sections 1 to 7 of this title. The court shall exclude from the amount of monetary relief awarded in such action any amount of monetary relief (A) which duplicates amounts which have been awarded for the same injury, or (B) which is properly allocable to (i) natural persons who have excluded their claims pursuant to subsection (b)(2) of this section, and (ii) any business entity.

(2) The court shall award the State as monetary relief threefold the total damage sustained as described in paragraph (1) of this subsection, and the cost of suit, including a reasonable attorney's fee. The court may award under this paragraph, pursuant to a motion by such State promptly made, simple interest on the total damage for the period beginning on the date of service of such State's pleading setting forth a

claim under the antitrust laws and ending on the date of judgment, or for any shorter period therein, if the court finds that the award of such interest for such period is just in the circumstances. In determining whether an award of interest under this paragraph for any period is just in the circumstances, the court shall consider only--

(A) whether such State or the opposing party, or either party's representative, made motions or asserted claims or defenses so lacking in merit as to show that such party or representative acted intentionally for delay or otherwise acted in bad faith;

(B) whether, in the course of the action involved, such State or the opposing party, or either party's representative, violated any applicable rule, statute, or court order providing for sanctions for dilatory behavior or otherwise providing for expeditious proceedings; and

(C) whether such State or the opposing party, or either party's representative, engaged in conduct primarily for the purpose of delaying the litigation or increasing the cost thereof.

Notice; exclusion election; final judgment

(b)(1) In any action brought under subsection (a)(1) of this section, the State attorney general shall, at such times, in such manner, and with such content as the court may direct, cause notice thereof to be given by publication. If the court finds that notice given solely by publication would deny due process of law to any person or persons, the court may direct further notice to such person or persons according to the circumstances of the case.

(2) Any person on whose behalf an action is brought under subsection (a)(1) of this section may elect to exclude from adjudication the portion of the State claim for monetary relief attributable to him by filing notice of such election with the court within such time as specified in the notice given pursuant to paragraph (1) of this subsection.

(3) The final judgment in an action under subsection (a)(1) of this section shall be res judicata as to any claim under section 5 of this title by any person on behalf of whom such action was brought and who fails to give such notice within the period specified in the notice given pursuant to paragraph (1) of this subsection.

Dismissal or compromise of action

(c) An action under subsection (a)(1) of this section shall not be dismissed or compromised without the approval of the court, and notice of any proposed dismissal or compromise shall be given in such manner as the court directs.

Attorneys' fees

(d) In any action under subsection (a) of this section--

(1) the amount of the plaintiffs' attorney's fee, if any, shall be determined by the court; and

(2) the court may, in its discretion, award a reasonable attorney's fee to a prevailing defendant upon a finding that the State attorney general has acted in bad faith, vexatiously, wantonly, or for oppressive reasons.

§ 4D Clayton Act, 15 U.S.C. § 15d

Measurement of damages

In any action under section 15c(a)(1) of this title, in which there has been a determination that a defendant agreed to fix prices in violation of the sections 1 to 7 of this title, damages may be proved and assessed in the aggregate by statistical or sampling methods, by the computation of illegal overcharges, or by such other reasonable system of estimating aggregate damages as the court in its discretion may permit without the necessity of separately proving the individual claim of, or amount of damage to, persons on whose behalf the suit was brought.

§ 4E Clayton Act, 15 U.S.C. § 15e

Distribution of damages

Monetary relief recovered in an action under section 15c(a)(1) of this title shall--

(1) be distributed in such manner as the district court in its discretion may authorize; or

(2) be deemed a civil penalty by the court and deposited with the State as general revenues;

subject in either case to the requirement that any distribution procedure adopted afford each person a reasonable opportunity to secure his appropriate portion of the net monetary relief.

§ 4F Clayton Act, 15 U.S.C. § 15f

Actions by Attorney General

(a) Whenever the Attorney General of the United States has brought an action under the antitrust laws, and he has reason to believe that any State attorney general would be entitled to bring an action under sections 12 to 27 of this title based substantially on the same alleged violation of the antitrust laws, he shall promptly give written notification thereof to such State attorney general.

(b) To assist a State attorney general in evaluating the notice or in bringing any action under sections 12 to 27 of this title, the Attorney General of the United States shall, upon request by such State attorney general, make available to him, to the extent permitted by law, any investigative files or other materials which are or may be relevant or material to the actual or potential cause of action under sections 12 to 27 of this title.

§ 4G Clayton Act, 15 U.S.C. § 15g

Definitions

For the purposes of sections 15c, 15d, 15e and 15f of this title:

(1) The term "State attorney general" means the chief legal officer of a State, or any other person authorized by State law to bring actions under section 15c of this title, and includes the Corporation Counsel of the District of Columbia, except that such term does not include any person employed or retained on--

(A) a contingency fee based on a percentage of the monetary relief awarded under this section; or

(B) any other contingency fee basis, unless the amount of the award of a reasonable attorney's fee to a prevailing plaintiff is determined by the court under section 15c(d)(1) of this title.

(2) The term "State" means a State, the District of Columbia, the Commonwealth of Puerto Rico, and any other territory or possession of the United States.

(3) The term "natural persons" does not include proprietorships or partnerships.

§ 4H Clayton Act, 15 U.S.C. § 15h

Applicability of parens patriae actions

Sections 15c, 15d, 15e, 15f, and 15g of this title shall apply in any State, unless such State provides by law for its nonapplicability in such State.

§ 5 Clayton Act, 15 U.S.C. § 16

Judgments--Prima facie evidence; collateral estoppel

(a) A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendent under said laws as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: Provided, That this section shall not apply to consent judgments or decrees entered before any testimony has been taken. Nothing contained in this section shall be construed to impose any limitations on the application of collaterel estoppel, except that, in any action or proceeding brought under the antitrust laws, collateral estoppel effect shall not be given to any finding made by the Federal Trade Commission under the antitrust laws or under section 45 of this title which could give rise to a claim for relief under the antitrust laws.

Consent judgments and competitive impact statements; publication in Federal Register; availability of copies to the public

(b) Any proposal for a consent judgment submitted by the United States for entry in any civil proceeding brought by or on behalf of the United States under the antitrust laws shall be filed with the district court before which such proceeding is pending and published by the United States in the Federal Register at least 60 days prior to the effective date of such judgment. Any written comments relating to such proposal and any responses by the United States thereto, shall also be filed with such district court and published by the United States in the Federal Register within such sixty-day period. Copies of such proposal and any other materials and documents which the United States considered determinative in formulating such proposal, shall also be made available to the public at the district court and in such other districts as the court may subsequently direct.

Simultaneously with the filing of such proposal, unless otherwise instructed by the court, the United States shall file with the district court, publish in the Federal Register, and thereafter furnish to any person upon request, a competitive impact statement which shall recite--

(1) the nature and purpose of the proceeding;

(2) a description of the practices or events giving rise to the alleged violation of the antitrust laws;

(3) an explanation of the proposal for a consent judgment, including an explanation of any unusual circumstances giving rise to such proposal or any provision contained therein, relief to be obtained thereby, and the anticipated effects on competition of such relief;

(4) the remedies available to potential private plaintiffs damaged by the alleged violation in the event that such proposal for the consent judgment is entered in such proceeding;

(5) a description of the procedures available for modification of such proposal; and

(6) a description and evaluation of alternatives to such proposal actually considered by the United States.

Publication of summaries in newspapers

(c) The United States shall also cause to be published, commencing at least 60 days prior to the effective date of the judgment described in subsection (b) of this section, for 7 days over a period of 2 weeks in newspapers of general circulation of the district in which the case has been filed, in the District of Columbia, and in such other districts as the court may direct--

(i) a summary of the terms of the proposal for the consent judgment,

(ii) a summary of the competitive impact statement filed under subsection (b) of this section,

(iii) and a list of the materials and documents under subsection (b) of this section which the United States shall make available for purposes of meaningful public comment, and the place where such materials and documents are available for public inspection.

Consideration of public comments by Attorney General and publication of response

(d) During the 60-day period as specified in subsection (b) of this section, and such additional time as the United States may request and the court may grant, the United States shall receive and consider any written comments relating to the proposal for the consent judgment submitted under subsection (b) of this section. The Attorney General or his designee shall establish procedures to carry out the provisions of this subsection, but such 60-day time period shall not be shortened except by order of the district court upon a showing that (1) extraordinary circumstances require such shortening and (2) such shortening is not adverse to the public interest. At the close of the period during which such comments may be received, the United States shall file with the district court and cause to be published in the Federal Register a response to such comments.

Public interest determination

(e) Before entering any consent judgment proposed by the United States under this section, the court shall determine that the entry of such judgment is in the public interest. For the purpose of such determination, the court may consider--

(1) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration or relief sought, anticipated effects of alternative remedies actually considered, and any other considerations bearing upon the adequacy of such judgment;

(2) the impact of entry of such judgment upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

Procedure for public interest determination

(f) In making its determination under subsection (e) of this section, the court may--

(1) take testimony of Government officials or experts or such other expert witnesses, upon motion of any party or participant or upon its own motion, as the court may deem appropriate;

(2) appoint a special master and such outside consultants or expert witnesses as the court may deem appropriate; and request and obtain the views, evaluations, or advice of any individual, group or agency of government with respect to any aspects of the proposed judgment or the effect of such judgment, in such manner as the court deems appropriate;

(3) authorize full or limited participation in proceedings before the court by interested persons or agencies, including appearance amicus curiae, intervention as a party pursuant to the Federal Rules of Civil Procedure, examination of witnesses or documentary materials, or participation in any other manner and extent which serves the public interest as the court may deem appropriate;

(4) review any comments including any objections filed with the United States under subsection (d) of this section ning the proposed judgment and the responses of the United States to such comments and objections; and

(5) take such other action in the public interest as the court may deem appropriate.

Filing of written or oral communications with the district court

(g) Not later than 10 days following the date of the filing of any proposal for a consent judgment under subsection (b) of this section, each defendant shall file with the district court a description of any and all written or oral communications by or on behalf of such defendant, including any and all written or oral communications on behalf of such defendant, or other person, with any officer or employee of the United States concerning or relevant to such proposal, except that any such communications made by counsel of record alone with the Attorney General or the employees of the Department of Justice alone shall be excluded from the requirements of this subsection. Prior to the entry of any consent judgment pursuant to the antitrust laws, each defendant shall certify to the district court that the requirements of this subsection have been complied with and that such filing is a true and complete description of such communications known to the defendant or which the defendant reasonably should have known.

Inadmissibility as evidence of proceedings before the district court and the competitive impact statement

(h) Proceedings before the district court under subsections (e) and (f) of this section, and the competitive impact statement filed under subsection (b) of this section, shall not be admissible against any defendant in any action or proceeding brought by any other party against such defendant under the antitrust laws or by the United States under section 15a of this title nor constitute a basis for the introduction of the consent judgment as prima facie evidence against such defendant in any such action or proceeding.

Suspension of limitations

(i) Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws, but not including an action under section 15a of this title, the running of the statute of limitations in respect of every private or State right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter: Provided, however, That whenever the running of the statute of limitations in respect of a cause of action arising under section 15 or 15c of this title is suspended hereunder, any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued.

§ 6 Clayton Act, 15 U.S.C. § 17

Antitrust laws not applicable to labor organizations

The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

§ 7 Clayton Act, 15 U.S.C. § 18

Acquisition by one corporation of stock of another

No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

No person shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisidiction of the Federal Trade Commission shall acquire the whole or any part of the assets of one or more persons engaged in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition, of such stocks or assets, or of the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition, or to tend to create a monopoly.

This section shall not apply to persons purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition. Nor shall anything contained in this section prevent a corporation engaged in commerce or in any activity affecting commerce from causing the formation of subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof, or from owning and holding all or a part of the stock of such subsidiary corporations, when the effect of such formation is not to substantially lessen competition.

Nor shall anything herein contained be construed to prohibit any common carrier subject to the laws to regulate commerce from aiding in the construction of branches or short lines so located as to become feeders to the main line of the company so aiding in such construction or from acquiring or owning all or any part of the stock of such branch lines, nor to prevent any such common carrier from acquiring and owning all or any part of the stock of a branch or short line constructed by an independent company where there is no substantial competition between the company owning the branch line so constructed and the company owning the main line acquiring the property or an interest therein, nor to prevent such common carrier from extending any of its lines through the medium of the acquisition of stock or otherwise of any other common carrier where there is no substantial competition between the company extending its lines and the company whose stock, property, or an interest therein is so acquired.

Nothing contained in this section shall be held to affect or impair any right heretofore legally acquired: Provided, That nothing in this section shall be held or construed to authorize or make lawful anything heretofore prohibited or made illegal by the antitrust laws, nor to exempt any person from the penal provisions thereof or the civil remedies therein provided.

Nothing contained in this section shall apply to transactions duly consummated pursuant to authority given by the Civil Aeronautics Board, Federal Communications Commission, Federal Power Commission, Interstate Commerce Commission, the Securities and Exchange Commission in the exercise of its jurisdiction under section 79j of this title, the United States Maritime Commission, or the Secretary of Agriculture under any statutory provision vesting such power in such Commission, Secretary, or Board.

§ 7A Clayton Act, 15 U.S.C. § 18a

Premerger notification and waiting period--Filing

(a) Except as exempted pursuant to subsection (c) of this section, no person shall acquire, directly or indirectly, any voting securities or assets of any other person, unless both persons (or in the case of a tender offer, the acquiring person) file notification pursuant to rules under subsection (d)(1) of this section and the waiting period described in subsection (b)(1) of this section has expired, if--

(1) the acquiring person, or the person whose voting securities or assets are being acquired, is engaged in commerce or in any activity affecting commerce;

(2)(A) any voting securities or assets of a person engaged in manufacturing which has annual net sales or total assets of $10,000,000 or more are being acquired by any person which has total assets or annual net sales of $100,000,000 or more;

(B) any voting securities or assets of a person not engaged in manufacturing which has total assets of $10,000,000 or more are being acquired by any person which has total assets or annual net sales of $100,000,000 or more; or

(C) any voting securities or assets of a person with annual net sales or total assets of $100,000,000 or more are being acquired by any person with total assets or annual net sales of $10,000,000 or more; and

(3) as a result of such acquisition, the acquiring person would hold--

(A) 15 per centum or more of the voting securities or assets of the acquired person, or

(B) an aggregate total amount of the voting securities and assets of the acquired person in excess of $15,000,000.

In the case of a tender offer, the person whose voting securities are sought to be acquired by a person required to file notification under this subsection shall file notification pursuant to rules under subsection (d) of this section.

Waiting period; publication; voting securities

(b)(1) The waiting period required under subsection (a) of this section shall--

(A) begin on the date of the receipt by the Federal Trade Commission and the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice (hereinafter referred to in this section as the "Assistant Attorney General") of--

(i) the completed notification required under subsection (a) of this section, or

(ii) if such notification is not completed, the notification to the extent completed and a statement of the reasons for such noncompliance, from both persons, or, in the case of a tender offer, the acquiring person; and

(B) end on the thirtieth day after the date of such receipt (or in the case of a cash tender offer, the fifteenth day), or on such later date as may be set under subsections (e)(2) or (g)(2) of this section.

(2) The Federal Trade Commission and the Assistant Attorney General may, in individual cases, terminate the waiting period specified in paragraph (1) and allow any person to proceed with any acquisition subject to this section, and promptly shall cause to be published in the Federal Register a notice that neither intends to take any action within such period with respect to such acquisition.

(3) As used in this section--

(A) The term "voting securities" means any securities which at present or upon conversion entitle the owner or holder thereof to vote for the election of directors of the issuer or, with respect to unincorporated issuers, persons exercising similar functions.

(B) The amount or percentage of voting securities or assets of a person which are acquired or held by another person shall be determined by aggregating the amount or percentage of such voting securities or assets held or acquired by such other person and each affiliate thereof.

Exempt transactions

(c) The following classes of transactions are exempt from the requirements of this section--

(1) acquisitions of goods or realty transferred in the ordinary course of business;

(2) acquisitions of bonds, mortgages, deeds of trust, or other obligations which are not voting securities;

(3) acquisitions of voting securities of an issuer at least 50 per centum of the voting securities of which are owned by the acquiring person prior to such acquisition;

(4) transfers to or from a Federal agency or a State or political subdivision thereof;

(5) transactions specifically exempted from the antitrust laws by Federal statute;

(6) transactions specifically exempted from the antitrust laws by Federal statute if approved by a Federal agency, if copies of all information and documentary material filed with such agency are contemporaneously filed with the Federal Trade Commission and the Assistant Attorney General;

(7) transactions which require agency approval under section 1828(c) of Title 12, or section 1842 of Title 12;

(8) transactions which require agency approval under section 1843 of Title 12, section 1726 or 1730a(e) of Title 12, or section 1464 of Title 12, if copies of all information and documentary material filed with any such agency are contemporaneously filed with the Federal Trade Commission and the Assistant Attorney General at least 30 days prior to consummation of the proposed transaction;

(9) acquisitions, solely for the purpose of investment, of voting securities, if, as a result of such acquisition, the securities acquired or held do not exceed 10 per centum of the outstanding voting securities of the issuer;

(10) acquisitions of voting securities, if, as a result of such acquisition, the voting securities acquired do not increase, directly or indirectly, the acquiring person's per centum share of outstanding voting securities of the issuer;

(11) acquisitions, solely for the purpose of investment, by any bank, banking association, trust company, investment company, or insurance company, of (A) voting securities pursuant to a plan of reorganization or dissolution; or (B) assets in the ordinary course of its business; and

(12) such other acquisitions, transfers, or transactions, as may be exempted under subsection (d)(2)(B) of this section.

Commission rules

(d) The Federal Trade Commission, with the concurrence of the Assistant Attorney General and by rule in accordance with section 553 of Title 5, consistent with the purposes of this section--

(1) shall require that the notification required under subsection (a) of this section be in such form and contain such documentary material and information relevant to a proposed acquisition as is necessary and appropriate to enable the Federal Trade Commission and the Assistant Attorney General to determine whether such acquisition may, if consummated, violate the antitrust laws; and

(2) may--

(A) define the terms used in this section;

(B) exempt, from the requirements of this section, classes of persons, acquisitions, transfers, or transactions which are not likely to violate the antitrust laws; and

(C) prescribe such other rules as may be necessary and appropriate to carry out the purposes of this section.

Additional information; waiting period extensions

(e)(1) The Federal Trade Commission or the Assistant Attorney General may, prior to the expiration of the 30-day waiting period (or in the case of a cash tender offer, the 15-day waiting period) specified in subsection (b)(1) of this section, require the submission of additional information or documentary material relevant to the proposed acquisition, from a person required to file notification with respect to such acquisition under subsection (a) of this section prior to the expiration of the waiting period specified in subsection (b)(1) of this section, or from any officer, director, partner, agent, or employee of such person.

(2) The Federal Trade Commission or the Assistant Attorney General, in its or his discretion, may extend the 30-day waiting period (or in the case of a cash tender offer, the 15-day waiting period) specified in subsection (b)(1) of this section for an additional period of not more than 20 days (or in the case of a cash tender offer, 10 days) after the date on which the Federal Trade Commission or the Assistant Attorney General, as the case

may be, receives from any person to whom a request is made under paragraph (1), or in the case of tender offers, the acquiring person, (A) all the information and documentary material required to be submitted pursuant to such a request, or (B) if such request is not fully complied with, the information and documentary material submitted and a statement of the reasons for such noncompliance, such additional period may be further extended only by the United States district court, upon an application by the Federal Trade Commission or the Assistant Attorney General pursuant to subsection (g)(2) of this section.

Preliminary injunctions; hearings

(f) If a proceeding is instituted or an action is filed by the Federal Trade Commission, alleging that a proposed acquisition violates section 18 of this title or section 45 of this title, or an action is filed by the United States, alleging that a proposed acquisition violates such section 18 of this title or section 1 or 2 of this title, and the Federal Trade Commission or the Assistant Attorney General (1) files a motion for a preliminary injunction against consummation of such acquisition pendente lite, and (2) certifies to the United States district court for the judicial district within which the respondent resides or carries on business, or in which the action is brought, that it or he believes that the public interest requires relief pendente lite pursuant to this subsection--

(A) upon the filing of such motion and certification, the chief judge of such district court shall immediately notify the chief judge of the United States court of appeals for the circuit in which such district court is located, who shall designate a United States district judge to whom such action shall be assigned for all purposes; and

(B) the motion for a preliminary injunction shall be set down for hearing by the district judge so designated at the earliest practicable time, shall take precedence over all matters except older matters of the same character and trials pursuant to section 3161 of Title 18, and shall be in every way expedited.

Civil penalty; compliance; power of court

(g)(1) Any person, or any officer, director, or partner thereof, who fails to comply with any provision of this section shall be liable to the United States for a civil penalty of not more than $10,000 for each day during which such person is in violation of this section. Such penalty may be recovered in a civil action brought by the United States.

(2) If any person, or any officer, director, partner, agent, or employee thereof, fails substantially to comply with the notification requirement under subsection (a) of this section or any request for the submission of additional information or documentary material under subsection (e)(1) of this section within the waiting period specified in subsection (b)(1) of this section and as may be extended under subsection (e)(2) of this section, the United States district court--

(A) may order compliance;

(B) shall extend the waiting period specified in subsection (b)(1) and as may have been extended under subsection (e)(2) until there has been substantial compliance, except that, in the case of a tender offer, the court may not extend such waiting period on the basis of a failure, by the person whose stock is sought to be acquired, to comply substantially with such notification requirement or any such request; and

(C) may grant such other equitable relief as the court in its discretion determines necessary or appropriate,

upon application of the Federal Trade Commission or the Assistant Attorney General.

Disclosure exemption

(h) Any information or documentary material filed with the Assistant Attorney General or the Federal Trade Commission pursuant to this section shall be exempt from disclosure under section 552 of Title 5, and no such information or documentary material may be made public, except as may be relevant to any administrative or judicial action or proceeding. Nothing in this section is intended to prevent disclosure to either body of Congress or to any duly authorized committee or subcommittee of the Congress.

Construction with other laws

(i)(1) Any action taken by the Federal Trade Commission or the Assistant Attorney General or any failure of the Federal Trade Commission or the Assistant Attorney General to take any action under this section shall not bar any proceeding or any action with respect to such acquisition at any time under sections 12 to 27 of this title or any other provision of law.

(2) Nothing contained in this section shall limit the authority of the Assistant Attorney General or the Federal Trade Commission to secure at any time from any person documentary material, oral testimony, or other information under the Antitrust Civil Process Act, the Federal Trade Commission Act, or any other provision of law.

Report to Congress; Legislative recommendations

(j) Beginning not later than January 1, 1978, the Federal Trade Commission, with the concurrence of the Assistant Attorney General, shall annually report to the Congress on the operation of this section. Such report shall include an assessment of the effects of this section, of the effects, purpose, and need for any rules promulgated pursuant thereto, and any recommendations for revisions of this section.

§ 8 Clayton Act, 15 U.S.C. § 19

Interlocking directorates and officers

No private banker or director, officer, or employee of any member bank of the Federal Reserve System or any branch thereof shall be at the same time a director, officer, or employee of any other bank, banking association, savings bank, or trust company organized under the National Bank Act or organized under the laws of any State or of the District of Columbia, or any branch thereof, except that the Board of Governors of the Federal Reserve System may by regulation permit such service as a director, officer, or employee of not more than one other such institution or branch thereof; but the foregoing prohibition shall not apply in the case of any one or more of the following or any branch thereof:

(1) A bank, banking association, savings bank, or trust company, more than 90 per centum of the stock of which is owned directly or indirectly by the United States or by any corporation of which the United States directly or indirectly owns more than 90 per centum of the stock.

(2) A bank, banking association, savings bank, or trust company which has been placed formally in liquidation or which is in the hands of a receiver, conservator, or other official exercising similar functions.

(3) A corporation, principally engaged in international or foreign banking or banking in a dependency or insular possession

of the United States which has entered into an agreement with the Board of Governors of the Federal Reserve System pursuant to sections 601 to 604a of Title 12.

(4) A bank, banking association, savings bank, or trust company, more than 50 per centum of the common stock of which is owned directly or indirectly by persons who own directly or indirectly more than 50 per centum of the common stock of such member bank.

(5) A bank, banking association, savings bank, or trust company not located and having no branch in the same city, town, or village as that in which such member bank or any branch thereof is located, or in any city, town, or village contiguous or adjacent thereto.

(6) A bank, banking association, savings bank, or trust company not engaged in a class or classes of business in which such member bank is engaged.

(7) A mutual savings bank having no capital stock.

Until February 1, 1939, nothing in this section shall prohibit any director, officer, or employee of any member bank of the Federal Reserve System, or any branch thereof, who is lawfully serving at the same time as a private banker or as a director, officer, or employee of any other bank, banking association, savings bank, or trust company, or any branch thereof, on August 23, 1935, from continuing such service.

The Board of Governors of the Federal Reserve System is authorized and directed to enforce compliance with this section, and to prescribe such rules and regulations as it deems necessary for that purpose.

No person at the same time shall be a director in any two or more corporations, any one of which has capital, surplus, and undivided profits aggregating more than $1,000,000, engaged in whole or in part in commerce, other than banks, banking associations, trust companies, and common carriers subject to the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, if such corporations are or shall have been theretofore, by virtue of their business and location of operation, competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the provisions of any of the antitrust laws. The eligibility of a director under the foregoing provision shall be determined by the aggregate amount of the capital, surplus, and undivided profits, exclusive of dividends declared but not paid to stockholders, at the end of the fiscal year of said corporation next preceding the election of directors, and when a director has been elected in accordance with the provisions of this Act it shall be lawful for him to continue as such for one year thereafter.

When any person elected or chosen as a director or officer or selected as an employee of any bank or other corporation subject to the provisions of this Act is eligible at the time of his election or selection to act for such bank or other corporation in such capacity his eligibility to act in such capacity shall not be affected and he shall not become or be deemed amenable to any of the provisions hereof by reason of any change in the affairs of such bank or other corporation from whatsoever cause, whether specifically excepted by any of the provisions hereof or not, until the expiration of one year from the date of his election or employment.

§ 10 Clayton Act, 15 U.S.C. § 20

Purchases by common carriers in case of interlocking directorates, etc.

No common carrier engaged in commerce shall have any dealings in securities, supplies, or other articles of commerce, or shall make or have any contracts for construction or maintenance of any kind, to the amount of more than $50,000, in the aggregate, in any one year, with another corporation, firm, partnership, or association when the said common carrier shall have upon its board of directors or as its president, manager, or as its purchasing or selling officer, or agent in the particular transaction, any person who is at the same time a director, manager, or purchasing or selling officer of, or who has any substantial interest in, such other corporation, firm, partnership, or association, unless and except such purchases shall be made from, or such dealings shall be with, the bidder whose bid is the most favorable to such common carrier, to be ascertained by competitive bidding under regulations to be prescribed by rule or otherwise by the Interstate Commerce Commission. No bid shall be received unless the name and address of the bidder or the names and addresses of the officers, directors, and general managers thereof, if the bidder be a corporation, or of the members, if it be a partnership or firm, be given with the bid.

§ 10 Clayton Act, 15 U.S.C. § 20 (cont'd)

Any person who shall, directly or indirectly, do or attempt to do anything to prevent anyone from bidding, or shall do any act to prevent free and fair competition among the bidders or those desiring to bid, shall be punished as prescribed in this section in the case of an officer or director.

Every such common carrier having any such transactions or making any such purchases shall, within thirty days after making the same, file with the Interstate Commerce Commission a full and detailed statement of the transaction showing the manner of the competitive bidding, who were the bidders, and the names and addresses of the directors and officers of the corporations and the members of the firm or partnership bidding; and whenever the said commission shall, after investigation or hearing, have reason to believe that the law has been violated in and about the said purchases or transactions, it shall transmit all papers and documents and its own views or findings regarding the transaction to the Attorney General.

If any common carrier shall violate this section, it shall be fined not exceeding $25,000; and every such director, agent, manager, or officer thereof who shall have knowingly voted for or directed the act constituting such violation, or who shall have aided or abetted in such violation, shall be deemed guilty of a misdemeanor and shall be fined not exceeding $5,000 or confined in jail not exceeding one year, or both, in the discretion of the court.

§ 11 Clayton Act, 15 U.S.C. § 21

Enforcement provisions--Commissions and Boards authorized to enforce compliance

(a) Authority to enforce compliance with sections 13, 14, 18, and 19 of this title by the persons respectively subject thereto is vested in the Interstate Commerce Commission where applicable to common carriers subject to the Interstate Commerce Act, as amended; in the Federal Communications Commission where applicable to common carriers engaged in wire or radio communication or radio transmission of energy; in the Civil Aeronautics Board where applicable to air carriers and foreign air carriers subject to the Civil Aeronautics Act of 1938; in the Federal Reserve Board where applicable to banks, banking associations, and trust companies; and in the Federal Trade Commission where applicable to all other character of commerce to be exercised as follows:

Issuance of complaints for violations; hearing; intervention; filing of testimony; report; cease and desist orders; reopening and alteration of reports or orders

(b) Whenever the Commission or Board vested with jurisdiction thereof shall have reason to believe that any person is violating or has violated any of the provisions of sections 13, 14, 18, and 19 of this title, it shall issue and serve upon such person and the Attorney General a complaint stating its charges in that respect, and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission or Board requiring such person to cease and desist from the violation of the law so charged in said complaint. The Attorney General shall have the right to intervene and appear in said proceeding and any person may make application, and upon good cause shown may be allowed by the Commission or Board, to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the Commission or Board. If upon such hearing the Commission or Board, as the case may be, shall be of the opinion that any of the provisions of said sections have been or are being violated, it shall make a report in writing, in which it shall state its findings as to the facts, and shall issue and cause to be served on such person an order requiring such person to cease and desist from such violations, and divest itself of the stock, or other share capital, or assets, held or rid itself of the directors chosen contrary to the provisions of sections 18 and 19 of this title, if any there be, in the manner and within the time fixed by said order. Until the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, or, if a petition for review has been filed within such time then until the record in the proceeding has been filed in a court of appeals of the United States, as hereinafter provided, the Commission or Board may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section. After the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, the Commission or Board may at any time, after notice and opportunity for hearing, reopen and alter, modify, or set aside, in whole or in part, any report or order made or issued by it under this section, whenever in the opinion of the Commission or Board conditions of fact or of law have so changed as to require such action or if the public interest shall so require: Provided, however, That the said person may, within sixty days after, service upon him or it of said report or order entered after such a reopening, obtain a review thereof in the appropriate court of appeals of the United States, in the manner provided in subsection (c) of this section.

Review of orders; jurisdiction; filing of petition and record of proceeding; conclusiveness of findings; additional evidence; modification of findings; finality of judgment and decree

(c) Any person required by such order of the commission or board to cease and desist from any such violation may obtain a review of such order in the court of appeals of the United States for any circuit within which such violation occurred or within which such person resides or carries on business, by filing in the court, within sixty days after the date of the service of such order, a written petition praying that the order of the commission or board be set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the commission or board, and thereupon the commission or board shall file in the court the record in the proceeding, as provided in section 2112 of Title 28. Upon such filing of the petition the court shall have jurisdiction of the proceeding and of the question determined therein concurrently with the commission or board until the filing of the record, and shall have power to make and enter a decree affirming, modifying, or setting aside the order of the commission or board, and enforcing the same to the extent that such order is affirmed, and to issue such writs as are ancillary to its jurisdiction or are necessary in its judgment to prevent injury to the public or to competitors pendente lite. The findings of the commission or board as to the facts, if supported by substantial evidence, shall be conclusive. To the extent that the order of the commission or board is affirmed, the court shall issue its own order commanding obedience to the terms of such order of the commission or board. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the commission or board, the court may order such additional evidence to be taken before the commission or board, and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The commission or board may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and shall file such modified or new findings, which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari, as provided in section 1254 of Title 28.

Exclusive jurisdiction of Court of Appeals

(d) Upon the filing of the record with it the jurisdiction of the court of appeals to affirm, enforce, modify, or set aside orders of the commission or board shall be exclusive.

Preference; liability under antitrust laws

(e) Such proceedings in the court of appeals shall be given precedence over other cases pending therein, and shall be in every way expedited. No order of the commission or board or judgment of the court to enforce the same shall in anywise relieve or absolve any person from any liability under the antitrust laws.

Service of complaints, orders and other processes

(f) Complaints, orders, and other processes of the commission or board under this section may be served by anyone duly authorized by the commission or board, either (1) by delivering a copy thereof to the person to be served, or to a member of the partnership to be served, or to the president, secretary, or other executive officer or a director of the corporation to be served; or (2) by leaving a copy thereof at the residence or the principal office or place of business of such person; or (3) by mailing by registered or certified mail a copy thereof addressed to such person at his or its residence or principal office or place of business. The verified return by the person so serving said complaint, order, or other process setting forth the manner of said service shall be proof of the same, and the return post office receipt for said complaint, order, or other process mailed by registered or certified mail as aforesaid shall be proof of the service of the same.

READEX FICHE

Finality of orders generally

(g) Any order issued under subsection (b) of this section shall become final--

(1) upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time; but the commission or board may thereafter modify or set aside its order to the extent provided in the last sentence of subsection (b) of this section; or

(2) upon the expiration of the time allowed for filing a petition for certiorari, if the order of the commission or board has been affirmed, or the petition for review has been dismissed by the court of appeals, and no petition for certiorari has been duly filed; or

(3) upon the denial of a petition for certiorari, if the order of the commission or board has been affirmed or the petition for review has been dismissed by the court of appeals; or

(4) upon the expiration of thirty days from the date of issuance of the mandate of the Supreme Court, if such Court directs that the order of the commission or board be affirmed or the petition for review be dismissed.

Finality of orders modified by Supreme Court

(h) If the Supreme Court directs that the order of the commission or board be modified or set aside, the order of the commission or board rendered in accordance with the mandate of the Supreme Court shall become final upon the expiration of thirty days from the time it was rendered, unless within such thirty days either party has instituted proceedings to have such order corrected to accord with the mandate, in which event the order of the commission or board shall become final when so corrected.

Finality of orders modified by Court of Appeals

(i) If the order of the commission or board is modified or set aside by the court of appeals, and if (1) the time allowed for filing a petition for certiorari has expired and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the court has been affirmed by the Supreme Court, then the order of the commission or board rendered in accordance with the mandate of the court of appeals shall become final on the expiration of thirty days from the time such order of the commission or board was rendered, unless within such thirty days either party has instituted proceedings to have such order corrected so that it will accord with the mandate, in which event the order of the commission or board shall become final when so corrected.

Finality of orders issued on rehearing ordered by Court of Appeals or Supreme Court

(j) If the Supreme Court orders a rehearing; or if the case is remanded by the court of appeals to the commission or board for a rehearing, and if (1) the time allowed for filing a petition for certiorari has expired, and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the court has been affirmed by the Supreme Court, then the order of the commission or board rendered upon such rehearing shall become final in the same manner as though no prior order of the commission or board had been rendered.

Definition of mandate

(k) As used in this section the term "mandate", in case a mandate has been recalled prior to the expiration of thirty days from the date of issuance thereof, means the final mandate.

Penalties

(l) Any person who violates any order issued by the commission or board under subsection (b) of this section after such order has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than $5,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the United States. Each separate violation of any such order shall be a separate offense, except that in the case of a violation through continuing failure or neglect to obey a final order of the commission or board each day of continuance of such failure or neglect shall be deemed a separate offense.

§ 12 Clayton Act, 15 U.S.C. § 22

District in which to sue corporation

Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found.

§ 13 Clayton Act, 15 U.S.C. § 23

Suits by United States; subpoenas for witnesses

In any suit, action, or proceeding brought by or on behalf of the United States subpoenas for witnesses who are required to attend a court of the United States in any judicial district in any case, civil or criminal, arising under the antitrust laws may run into any other district: Provided, That in civil cases no writ of subpoena shall issue for witnesses living out of the district in which the court is held at a greater distance than one hundred miles from the place of holding the same without the permission of the trial court being first had upon proper application and cause shown.

§ 14 Clayton Act, 15 U.S.C. § 24

Liability of directors and agents of corporation

Whenever a corporation shall violate any of the penal provisions of the antitrust laws, such violation shall be deemed to be also that of the individual directors, officers, or agents of such corporation who shall have authorized, ordered, or done any of the acts constituting in whole or in part such violation, and such violation shall be deemed a misdemeanor, and upon conviction therefor of any such director, officer, or agent he shall be punished by a fine of not exceeding $5,000 or by imprisonment for not exceeding one year, or by both, in the discretion of the court.

§ 15 Clayton Act, 15 U.S.C. § 25

Restraining violations; procedure

The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of this Act, and it shall be the duty of the several United States attorneys, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition, the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition, and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises. Whenever it shall appear to the court before which any such proceeding may be pending that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned whether they reside in the district in which the court is held or not, and subpoenas to that end may be served in any district by the marshal thereof.

§ 16 Clayton Act, 15 U.S.C. § 26

Injunctive relief for private parties; exception

Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: Provided, That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission. In any action under this section in which the plaintiff substantially prevails, the court shall award the cost of suit, including a reasonable attorney's fee, to such plaintiff.

§ 26 Clayton Act, 15 U.S.C. § 26a

Restrictions on the purchase of gasohol and synthetic motor fuel--Limitations on the use of credit instruments, sales, resales, and transfers

(a) Except as provided in subsection (b) of this section, it shall be unlawful for any person engaged in commerce, in the course of such commerce, directly or indirectly to impose any condition, restriction, agreement, or understanding that--

(1) limits the use of credit instruments in any transaction concerning the sale, resale, or transfer of gasohol or other synthetic motor fuel of equivalent usability in any case in which there is no similar limitation on transactions concerning such person's conventional motor fuel; or

(2) otherwise unreasonably discriminates against or unreasonably limits the sale, resale, or transfer of gasohol or other synthetic motor fuel of equivalent usability in any case in which such synthetic or conventional motor fuel is sold for use, consumption, or resale within the United States.

Credit fees; equivalent conventional motor fuel sales; labeling of pumps; product liability disclaimers; advertising support; furnishing facilities

(b)(1) Nothing in this section or in any other provision of law in effect on December 2, 1980, which is specifically applicable to the sale of petroleum products shall preclude any person referred to in subsection (a) of this section from imposing a reasonable fee for credit on the sale, resale, or transfer of the gasohol or other synthetic motor fuel referred to in subsection (a) of this section if such fee equals no more than the actual costs to such person of extending that credit.

(2) The prohibitions in this section shall not apply to any person who makes available sufficient supplies of gasohol and other synthetic motor fuels of equivalent usability to satisfy his customers' needs for such products, if the gasohol and other synthetic fuels are made available on terms and conditions which are equivalent to the terms and conditions on which such person's conventional motor fuel products are made available.

(3) Nothing in this section shall--

(A) preclude any person referred to in subsection (a) of this section from requiring reasonable labeling of pumps dispensing the gasohol or other synthetic motor fuel referred to in subsection (a) of this section to indicate, as appropriate, that such gasohol or other synthetic motor fuel is not manufactured, distributed, or sold by such person;

(B) preclude such person from issuing appropriate disclaimers of product liability for damage resulting from use of the gasohol or other synthetic motor fuel;

(C) require such person to provide advertising support for the gasohol or other synthetic motor fuel; or

(D) require such person to furnish or provide, at such person's own expense, any additional pumps, tanks, or other related facilities required for the sale of the gasohol or other synthetic motor fuel.

Definition

(c) As used in this section, "United States" includes the several States, the District of Columbia, any territory of the United States and any insular possession or other place under the jurisdiction of the United States.

§ 27 Clayton Act, 15 U.S.C. § 27

Effect of partial invalidity

If any clause, sentence, paragraph, or part of this Act shall, for any reason, be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair, or invalidate the remainder thereof, but shall be confined in its operation to the clause, sentence, paragraph, or part thereof directly involved in the controversy in which such judgment shall have been rendered.

C. THE EXPEDITING ACT (15 U.S.C. §§ 28-29)

§ 4 Expediting Act, 15 U.S.C. § 28

Expedition of actions by United States involving general public importance

In any civil action brought in any district court of the United States under the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies", approved July 2, 1890, or any other Acts having like purpose that have been or hereafter may be enacted, wherein the United States is plaintiff and equitable relief is sought, the Attorney General may file with the court, prior to the entry of final judgment, a certificate that, in his opinion, the case is of a general public importance. Upon filing of such certificate, it shall be the duty of the judge designated to hear and determine the case, or the chief judge of the district court if no judge has as yet been designated, to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited.

§ 5 Expediting Act, 15 U.S.C. § 29

Appeals--Court of Appeals; review by Supreme Court

(a) Except as otherwise expressly provided by this section, in every civil action brought in any district court of the United States under the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies", approved July 2, 1890, or any other Acts having like purpose that have been or hereafter may be enacted, in which the United States is the complainant and equitable relief is sought, any appeal from a final judgment entered in any such action shall be taken to the court of appeals pursuant to sections 1291 and 2107 of Title 28.

Any appeal from an interlocutory order entered in any such action shall be taken to the court of appeals pursuant to sections 1292(a)(1) and 2107 of Title 28 but not otherwise. Any judgment entered by the court of appeals in any such action shall be subject to review by the Supreme Court upon a writ of certiorari as provided in section 1254(1) of Title 28.

Direct appeals to Supreme Court

(b) An appeal from a final judgment pursuant to subsection (a) of this section shall lie directly to the Supreme Court if, upon application of a party filed within fifteen days of the filing of a notice of appeal, the district judge who adjudicated the case enters an order stating that immediate consideration of the appeal by the Supreme Court is of general public importance in the administration of justice. Such order shall be filed within thirty days after the filing of a notice of appeal. When such an order is filed, the appeal and any cross appeal shall be docketed in the time and manner prescribed by the rules of the Supreme Court. The Supreme Court shall thereupon either (1) dispose of the appeal and any cross appeal in the same manner as any other direct appeal authorized by law, or (2) in its discretion, deny the direct appeal and remand the case to the court of appeals, which shall then have jurisdiction to hear and determine the same as if the appeal and any cross appeal therein had been docketed in the court of appeals in the first instance pursuant to subsection (a) of this section.

D. ANTITRUST CIVIL PROCESS ACT, 15 U.S.C. §§ 1311-1314

§ 101 Civil Process Act, 15 U.S.C. § 1311

Definitions

For the purposes of this chapter--

(a) The term "antitrust law" includes:

(1) Each provision of law defined as one of the antitrust laws by section 12 of this title; and

(2) Any statute enacted on and after September 19, 1962 by the Congress which prohibits, or makes available to the United States in any court of the United States any civil

remedy with respect to any restraint upon or monopolization of interstate or foreign trade or commerce;

(b) The term "antitrust order" means any final order, decree, or judgment of any court of the United States, duly entered in any case or proceeding arising under any antitrust law;

(c) The term "antitrust investigation" means any inquiry conducted by any antitrust investigator for the purpose of ascertaining whether any person is or has been engaged in any antitrust violation or in any activities in preparation for a merger, acquisition, joint venture, or similar transaction, which, if consummated, may result in an antitrust violation;

(d) The term "antitrust violation" means any act or omission in violation of any antitrust law or any antitrust order;

(e) The term "antitrust investigator" means any attorney or investigator employed by the Department of Justice who is charged with the duty of enforcing or carrying into effect any antitrust law;

(f) The term "person" means any natural person, partnership, corporation, association, or other legal entity, including any person acting under color or authority of State law;

(g) The term "documentary material" includes the original or any copy of any book, record, report, memorandum, paper, communication, tabulation, chart, or other document, and any product of discovery;

(h) The term "custodian" means the custodian or any deputy custodian designated under section 1313(a) of this title;

(i) The term "product of discovery" includes without limitation the original or duplicate of any deposition, interrogatory, document, thing, result of the inspection of land or other property, examination, or admission obtained by any method of discovery in any judicial litigation or in any administrative litigation of an adversarial nature; any digest, analysis, selection, compilation, or any derivation thereof; and any index or manner of access thereto; and

(j) The term "agent" includes any person retained by the Department of Justice in connection with the enforcement of the antitrust laws.

§ 102 Civil Process Act, 15 U.S.C. § 1312

Civil investigative demands--Issuance; service; production of material; testimony

(a) Whenever the Attorney General, or the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice, has reason to believe that any person may be in possession, custody, or control of any documentary material, or may have any information, relevant to a civil antitrust investigation, he may, prior to the institution of a civil or criminal proceeding thereon, issue in writing, and cause to be served upon such person, a civil investigative demand requiring such person to produce such documentary material for inspection and copying or reproduction, to answer in writing written interrogatories, to give oral testimony concerning documentary material or information, or to furnish any combination of such material, answers, or testimony. Whenever a civil investigative demand is an express demand for any product of discovery, the Attorney General or the Assistant Attorney General in charge of the Antitrust Division shall cause to be served, in any manner authorized by this section, a copy of such demand upon the person from whom the discovery was obtained and notify the person to whom such demand is issued of the date on which such copy was served.

Contents; return date for demand for product of discovery

(b) Each such demand shall--

(1) state the nature of--

(A) the conduct constituting the alleged antitrust violation, or

(B) the activities in preparation for a merger, acquisition, joint venture, or similar transaction, which, if consummated, may result in an antitrust violation,

which are under investigation and the provision of law applicable thereto;

(2) if it is a demand for production of documentary material--

(A) describe the class or classes of documentary material to be produced thereunder with such definiteness and certainty as to permit such material to be fairly identified;

(B) prescribe a return date or dates which will provide a reasonable period of time within which the material so demanded may be assembled and made available for inspection and copying or reproduction; and

(C) identify the custodian to whom such material shall be made available; or

(3) if it is a demand for answers to written interrogatories--

(A) propound with definiteness and certainty the written interrogatories to be answered;

(B) prescribe a date or dates at which time answers to written interrogatories shall be submitted; and

(C) identify the custodian to whom such answers shall be submitted; or

(4) if it is a demand for the giving of oral testimony--

(A) prescribe a date, time, and place at which oral testimony shall be commenced; and

(B) identify an antitrust investigator who shall conduct the examination and the custodian to whom the transcript of such examination shall be submitted.

Any such demand which is an express demand for any product of discovery shall not be returned or returnable until twenty days after a copy of such demand has been served upon the person from whom the discovery was obtained.

Protected material or information; demand for product of discovery superseding disclosure restrictions except trial preparation materials

(c)(1) No such demand shall require the production of any documentary material, the submission of any answers to written interrogatories, or the giving of any oral testimony, if such material, answers, or testimony would be protected from disclosure under--

(A) the standards applicable to subpoenas or subpoenas duces tecum issued by a court of the United States in aid of a grand jury investigation, or

(B) the standards applicable to discovery requests under the Federal Rules of Civil Procedure, to the extent that the application of such standards to any such demand is appropriate and consistent with the provisions and purposes of this chapter.

(2) Any such demand which is an express demand for any product of discovery supersedes any inconsistent order, rule, or provision of law (other than this chapter) preventing or restraining disclosure of such product of discovery to any person. Disclosure of any product of discovery pursuant to any such express demand does not constitute a waiver of any right or privilege, including without limitation any right or privilege which may be invoked to resist discovery of trial preparation materials, to which the person making such disclosure may be entitled.

Service; jurisdiction

(d)(1) Any such demand may be served by any antitrust investigator, or by any United States marshal or deputy marshal, at any place within the territorial jurisdiction of any court of the United States.

(2) any [1] such demand or any petition filed under section 1314 of this title may be served upon any person who is not to be found within the territorial jurisdiction of any court of the United States, in such manner as the Federal Rules of Civil Procedure prescribe for service in a foreign country. To the extent that the courts of the United States can assert jurisdiction over such person consistent with due process, the United States District Court for the District of Columbia shall have the same jurisdiction to take any action respecting compliance with this chapter by such person that such court would have if such person were personally within the jurisdiction of such court.

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[1] So in original. Probably should be "Any". [This note appears in 15 U.S.C.A. § 1312 at page 564.]

Service upon legal entities and natural persons

(e)(1) Service of any such demand or of any petition filed under section 1314 of this title may be made upon a partnership, corporation, association, or other legal entity by--

(A) delivering a duly executed copy thereof to any partner, executive officer, managing agent, or general agent thereof, or to any agent thereof authorized by appointment or by law to receive service of process on behalf of such partnership, corporation, association, or entity;

(B) delivering a duly executed copy thereof to the principal office or place of business of the partnership, corporation, association, or entity to be served; or

(C) depositing such copy in the United States mails, by registered or certified mail, return receipt requested, duly addressed to such partnership, corporation, association, or entity at its principal office or place of business.

(2) Service of any such demand or of any petition filed under section 1314 of this title may be made upon any natural person by--

(A) delivering a duly executed copy thereof to the person to be served; or

(B) depositing such copy in the United States mails by registered or certified mail, return receipt requested, duly addressed to such person at his residence or principal office or place of business.

Proof of service

(f) A verified return by the individual serving any such demand or petition setting forth the manner of such service shall be proof of such service. In the case of service by registered or certified mail, such return shall be accompanied by the return post office receipt of delivery of such demand.

Sworn certificates

(g) The production of documentary material in response to a demand served pursuant to this section shall be made under a sworn certificate, in such form as the demand designates, by the person, if a natural person, to whom the demand is directed or, if not a natural person, by a person or persons having knowledge of the facts and circumstances relating to such production, to the effect that all of the documentary material required by the demand and in the possession, custody, or control of the person to whom the demand is directed has been produced and made available to the custodian.

Interrogatories

(h) Each interrogatory in a demand served pursuant to this section shall be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for the objection shall be stated in lieu of an answer, and it shall be submitted under a sworn certificate, in such form as the demand designates, by the person, if a natural person, to whom the demand is directed or, if not a natural person, by a person or persons responsible for answering each interrogatory, to the effect that all information required by the demand and in the possession, custody, control, or knowledge of the person to whom the demand is directed has been submitted.

Oral examinations

(i)(1) The examination of any person pursuant to a demand for oral testimony served under this section shall be taken before an officer authorized to administer oaths and affirmations by the laws of the United States or of the place where the examination is held. The officer before whom the testimony is to be taken shall put the witness on oath or affirmation and shall personally, or by someone acting under his direction and in his presence, record the testimony of the witness. The testimony shall be taken stenographically and transcribed. When the testimony is fully transcribed, the officer before whom the testimony is taken shall promptly transmit a copy of the transcript of the testimony to the custodian.

(2) The antitrust investigator or investigators conducting the examination shall exclude from the place where the examination is held all other persons except the person being examined, his counsel, the officer before whom the testimony is to be taken, and any stenographer taking such testimony. The provisons of section 30 of this title shall not apply to such examinations.

(3) The oral testimony of any person taken pursuant to a demand served under this section shall be taken in the judicial district of the United States within which such person resides, is found, or transacts business, or in such other place as may be agreed upon by the antitrust investigator conducting the examination and such person.

(4) When the testimony is fully transcribed, the antitrust investigator or the officer shall afford the witness (who may be accompanied by counsel) a reasonable opportunity to examine the transcript; and the transcript shall be read to or by the witness, unless such examination and reading are waived by the witness. Any changes in form or substance which the witness desires to make shall be entered and identified upon the transcript by the officer or the antitrust investigator with a statement of the reasons given by the witness for making such changes. The transcript shall then be signed by the witness, unless the witness in writing waives the signing, is ill, cannot be found, or refuses to sign. If the transcript is not signed by the witness within thirty days of his being afforded a reasonable opportunity to examine it, the officer or the antitrust investigator shall sign it and state on the record the fact of the waiver, illness, absence of the witness, or the refusal to sign, together with the reason, if any, given therefor.

(5) The officer shall certify on the transcript that the witness was duly sworn by him and that the transcript is a true record of the testimony given by the witness, and the officer or antitrust investigator shall promptly deliver it or send it by registered or certified mail to the custodian.

(6) Upon payment of reasonable charges therefor, the antitrust investigator shall furnish a copy of the transcript to the witness only, except that the Assistant Attorney General in charge of the Antitrust Division may for good cause limit such witness to inspection of the official transcript of his testimony.

(7)(A) Any person compelled to appear under a demand for oral testimony pursuant to this section may be accompanied, represented, and advised by counsel. Counsel may advise such person, in confidence, either upon the request of such person or upon counsel's own initiative, with respect to any question asked of such person. Such person or counsel may object on the record to any question, in whole or in part, and shall briefly state for the record the reason for the objection. An objection may properly be made, received, and entered upon the record when it is claimed that such person is entitled to refuse to answer the question on grounds of any constitutional or other legal right or privilege, including the privilege against self-incrimination. Such person shall not otherwise object to or refuse to answer any question, and shall not by himself or through counsel otherwise interrupt the oral examination. If such person refuses to answer any question, the antitrust investigator conducting the examination may petition the district court of the United States pursuant to section 1314 of this title for an order compelling such person to answer such question.

(B) If such person refuses to answer any question on grounds of the privilege against self-incrimination, the testimony of such person may be compelled in accordance with the provisions of Part V of Title 18.

(8) Any person appearing for oral examination pursuant to a demand served under this section shall be entitled to the same fees and mileage which are paid to witnesses in the district courts of the United States.

§ 103 Civil Process Act, 15 U.S.C. § 1313

Custodian of documents, answers and transcripts--Designation

(a) The Assistant Attorney General in charge of the Antitrust Division of the Department of Justice shall designate an antitrust investigator to serve as custodian of documentary material, answers to interrogatories, and transcripts of oral testimony received under this chapter, and such additional antitrust investigators as he shall determine from time to time to be necessary to serve as deputies to such officer.

Production of materials

(b) Any person, upon whom any demand under section 1312 of this title for the production of documentary material has been duly served, shall make such material available for inspection and copying or reproduction to the custodian designated therein at the principal place of business of such person (or at such other place as such custodian and such person thereafter may agree and prescribe in writing or as the court may direct, pursuant to section 1314(d) of this title) on the return date specified in such demand (or on such later date as such custodian may prescribe in writing). Such person may upon written agreement between such person and the custodian substitute copies for originals of all or any part of such material.

Responsibility for materials; disclosure

(c)(1) The custodian to whom any documentary material, answers to interrogatories, or transcripts of oral testimony are delivered shall take physical possession thereof, and shall be responsible for the use made thereof and for the return of documentary material, pursuant to this chapter.

(2) The custodian may cause the preparation of such copies of such documentary material, answers to interrogatories, or transcripts of oral testimony as may be required for official use by any duly authorized official, employee, or agent of the Department of Justice under regulations which shall be promulgated by the Attorney General. Notwithstanding paragraph (3) of this subsection, such material, answers, and transcripts may be used by any such official, employee, or agent in connection with the taking of oral testimony pursuant to this chapter.

(3) Except as otherwise provided in this section, while in the possession of the custodian, no documentary material, answers to interrogatories, or transcripts of oral testimony, or copies thereof, so produced shall be available for examination, without the consent of the person who produced such material, answers, or transcripts, and, in the case of any product of discovery produced pursuant to an express demand for such material, of the person from whom the discovery was obtained, by any individual other than a duly authorized official, employee, or agent of the Department of Justice. Nothing in this section is intended to prevent disclosure to either body of the Congress or to any authorized committee or subcommittee thereof.

(4) While in the possession of the custodian and under such reasonable terms and conditions as the Attorney General shall prescribe, (A) documentary material and answers to interrogatories shall be available for examination by the person who produced such material or answers, or by any duly authorized representative of such person, and (B) transcripts of oral testimony shall be available for examination by the person who produced such testimony, or his counsel.

Use of investigative files

(d)(1) Whenever any attorney of the Department of Justice has been designated to appear before any court, grand jury, or Federal administrative or regulatory agency in any case or proceeding, the custodian of any documentary material, answers to interrogatories, or transcripts of oral testimony may deliver to such attorney such material, answers, or transcripts for official use in connection with any such case, grand jury, or proceeding as such attorney determines to be required. Upon the completion of any such case, grand jury, or proceeding, such attorney shall return to the custodian any such material, answers, or transcripts so delivered which have not passed into the control of such court, grand jury, or agency through the introduction thereof into the record of such case or proceeding.

(2) The custodian of any documentary material, answers to interrogatories, or transcripts of oral testimony may deliver to the Federal Trade Commission, in response to a written request, copies of such material, answers, or transcripts for use in connection with an investigation or proceeding under the Commission's jurisdiction. Such material, answers, or transcripts may only be used by the Commission in such manner and subject to such conditions as apply to the Department of Justice under this chapter.

Return of material to producer

(e) If any documentary material has been produced in the course of any antitrust investigation by any person pursuant to a demand under this chapter, and--

(1) any case or proceeding before any court or grand jury arising out of such investigation, or any proceeding before any Federal administrative or regulatory agency involving such material, has been completed, or

> (2) no case or proceeding, in which such material may be used, has been commenced within a reasonable time after completion of the examination and analysis of all documentary material and other information assembled in the course of such investigation,

the custodian shall, upon written request of the person who produced such material, return to such person any such material (other than copies thereof furnished to the custodian pursuant to subsection (b) of this section or made by the Department of Justice pursuant to subsection (c) of this section) which has not passed into the control of any court, grand jury, or agency through the introduction thereof into the record of such case or proceeding.

Appointment of successor custodians

(f) In the event of the death, disability, or separation from service in the Department of Justice of the custodian of any documentary material, answers to interrogatories, or transcripts of oral testimony produced under any demand issued pursuant to this chapter, or the official relief of such custodian from responsibility for the custody and control of such material, answers, or transcripts, the Assistant Attorney General in charge of the Antitrust Division shall promptly (1) designate another antitrust investigator to serve as custodian of such material, answers, or transcripts, and (2) transmit in writing to the person who produced such material, answers, or testimony notice as to the identity and address of the successor so designated. Any successor designated under this subsection shall have with regard to such material, answers, or transcripts all duties and responsibilities imposed by this chapter upon his predecessor in office with regard thereto, except that he shall not be held responsible for any default or dereliction which occurred prior to his designation.

§ 104 Civil Process Act, 15 U.S.C. § 1314

Judicial proceedings--Petition for enforcement; venue

(a) Whenever any person fails to comply with any civil investigative demand duly served upon him under section 1312 of this title or whenever satisfactory copying or reproduction of any such material cannot be done and such person refuses to surrender such material, the Attorney General, through such officers or attorneys as he may designate, may file, in the district court of the United States for any judicial district in which such person resides, is found, or transacts business, and serve upon such person a petition for an order of such court for the enforcement of this chapter.

Petition for order modifying or setting aside demand; time for petition; suspension of time allowed for compliance with demand during pendency of petition; grounds for relief

(b)(1) Within twenty days after the service of any such demand upon any person, or at any time before the return date specified in the demand, whichever period is shorter, or within such period exceeding twenty days after service or in excess of such return date as may be prescribed in writing, subsequent to service, by any antitrust investigator named in the demand, such person may file and serve upon such antitrust investigator, and in the case of any express demand for any product of discovery upon the person from whom such discovery was obtained, a petition for an order modifying or setting aside such demand--

(A) in the district court of the United States for the judicial district within which such person resides, is found, or transacts business; or

(B) in the case of a petition addressed to an express demand for any product of discovery, only in the district court of the United States for the judicial district in which the proceeding in which such discovery was obtained is or was last pending.

(2) The time allowed for compliance with the demand in whole or in part as deemed proper and ordered by the court shall not run during the pendency of such petition in the court, except that such person shall comply with any portions of the demand not sought to be modified or set aside. Such petition shall specify each ground upon which the petitioner relies in seeking such relief and may be based upon any failure of such demand to comply with the provisions of this chapter, or upon any constitutional or other legal right or privilege of such person.

Petition for order modifying or setting aside demand for production of product of discovery; grounds for relief; stay of compliance with demand and of running of time allowed for compliance with demand

(c) Whenever any such demand is an express demand for any product of discovery, the person from whom such discovery was obtained may file, at any time prior to compliance with such express demand, in the district court of the United States for the judicial district in which the proceeding in which such discovery was obtained is or was last pending, and serve upon any antitrust investigator named in the demand and upon the recipient of the demand, a petition for an order of such court modifying or setting aside those portions of the demand requiring production of any such product of discovery. Such petition shall specify each ground upon which the petitioner relies in seeking such relief and may be based upon any failure of such portions of the demand to comply with the provisions of this chapter, or upon any constitutional or other legal right or privilege of the petitioner. During the pendency of such petition, the court may stay, as it deems proper, compliance with the demand and the running of the time allowed for compliance with the demand.

Petition for order requiring performance by custodian of duties; venue

(d) At any time during which any custodian is in custody or control of any documentary material or answers to interrogatories delivered, or transcripts of oral testimony given by any person in compliance with any such demand, such person, and, in the case of an express demand for any product of discovery, the person from whom such discovery was obtained, may file, in the district court of the United States for the judicial district within which the office of such custodian is situated, and serve upon such custodian a petition for an order of such court requiring the performance by such custodian of any duty imposed upon him by this chapter.

Jurisdiction; appeal; contempts

(e) Whenever any petition is filed in any district court of the United States under this section, such court shall have jurisdiction to hear and determine the matter so presented, and to enter such order or orders as may be required to carry into effect the provisions of this chapter. Any final order so entered shall be subject to appeal pursuant to section 1291 of Title 28. Any disobedience of any final order entered under this section by any court shall be punished as a contempt thereof.

Applicability of Federal Rules of Civil Procedure

(f) To the extent that such rules may have application and are not inconsistent with the provisions of this chapter, the Federal Rules of Civil Procedure shall apply to any petition under this chapter.

Disclosure exemption

(g) Any documentary material, answers to written interrogatories, or transcripts of oral testimony provided pursuant to any demand issued under this chapter shall be exempt from disclosure under section 552 of Title 5.

E. FALSE CLAIMS ACT (31 U.S.C. §§ 231-233, 235)

31 U.S.C. § 231, Liability of persons making false claims

Any person not in the military or naval forces of the United States, or in the militia called into or actually employed in the service of the United States, who shall make or cause to be made, or present or cause to be presented, for payment or approval, to or by any person or officer in the civil, miliary, or naval service of the United States, any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent, or who, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, makes, uses, or causes to be made or used, any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, or who enters into any agreement, combination, or conspiracy to defraud the Government of the United States, or any department or officer thereof, by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim, or who, having charge, possession, custody, or control of any money or other public property used or to be used in the military or naval service, who, with intent to defraud the United States or willfully to conceal such money or other property, delivers or causes to be delivered, to any other person having authority to receive the same, any amount of such money or other property less than that for which he received a certificate or took a receipt, and every person authorized to make or deliver any certificate, voucher, receipt, or other paper certifying the receipt of arms, ammunition, provisions, clothing, or other property so used or to be used, who makes or delivers the same to any other person without a full knowledge of the truth of the facts stated therein, and with intent to defraud the United States, and every person who knowingly purchases or receives in pledge for any obligation or indebtedness from any soldier, officer, sailor, or other person called into or employed in the military or naval service any arms, equipments, ammunition, clothes, military stores, or other public property, such soldier, sailor, officer, or other person not having the lawful right to pledge or sell the same, shall forfeit and pay to the United States the sum of $2,000, and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such act, together with the costs of suit; and such forfeiture and damages shall be sued for in the same suit.

31 U.S.C. § 232, Same; suits; procedure

(A) The several district courts of the United States, the several district courts of the Territories of the United States, within whose jurisdictional limits the person doing or committing such act shall be found, shall wheresoever such act may have been done or committed, have full power and jurisdiction to hear, try, and determine such suit.

(B) Except as hereinafter provided, such suit may be brought and carried on by any person, as well for himself as for the United States, the same shall be at the sole cost and charge of such person, and shall be in the name of the United States, but shall not be withdrawn or discontinued without the consent, in writing, of the judge of the court and the United States attorney, first filed in the case, setting forth their reasons for such consent.

(C) Whenever any such suit shall be brought by any person under clause (B) of this section notice of the pendency of such suit shall be given to the United States by serving upon the United States attorney for the district in which such suit shall have been brought a copy of the bill of complaint and by sending, by registered mail, or by certified mail, to the Attorney General of the United States at Washington, District of Columbia, a copy of such bill together with a disclosure in writing of substantially all evidence and information in his possession material to the effective prosecution of such suit. The United States shall have sixty days, after service as above provided, within which to enter appearance in such suit. If the United States shall fail, or decline in writing to the court, during said period of sixty days to enter any such suit, such person may carry on such suit. If the United States within said period shall enter appearance in such suit the same shall be carried on solely by the United States. In carrying on such suit the United States shall not be bound by any action taken by the person who brought it, and may proceed in all respects as if it were instituting the suit: Provided, That if the United States shall fail to carry on such suit with due diligence within a period of six months from the date of its appearance therein, or within such additional time as the court after notice may allow, such suit may be carried on by the person bringing the same in accordance with clause (B) of this section. The court shall have no jurisdiction to proceed with any such suit brought under clause (B) of this section or pending suit brought under this section whenever it shall be made to appear that such suit was based upon evidence or information in the possession of the United States, or any agency, officer or employee thereof, at the time such suit was brought: Provided, however, That no abatement shall be had as to a suit pending on December 23, 1943, if before such suit was filed such person had in his possession and voluntarily disclosed to the Attorney General substantial evidence and information which was not theretofore in the possession of the Department of Justice.

(D) In any suit whether or not on appeal pending on December 23, 1943, brought under this section, the court in which such suit is pending shall stay all further proceedings, and shall forthwith cause written notice, by registered mail, or by certified mail, to be given the Attorney General that such suit is pending, and the Attorney General shall have sixty days from the date of such notice to appear and carry on such suit in accordance with clause (C) of this section.

(E)(1) In any such suit, if carried on by the United States as herein provided, the court may award to the person who brought such suit, out of the proceeds of such suit or any settlement of any claim involved therein, which shall be collected, an amount which in the judgment of the court is fair and reasonable compensation to such person for disclosure of the information or evidence not in the possession of the United States when such suit was brought. Any such award shall in no event exceed one-tenth of the proceeds of such suit or any settlement thereof.

(2) In any such suit when not carried on by the United States as herein provided, whether heretofore or hereafter brought, the court may award to the person who brought such suit and prosecuted it to final judgment, or to settlement, as provided in clause (B) of this section, out of the proceeds of such suit or any settlement of any claim involved therein, which shall be collected, an amount, not in excess of one-fourth of the proceeds of such suit or any settlement thereof, which in the judgment of the court is fair and reasonable compensation to such person for the collection of any forfeiture and damages; and such person shall be entitled to receive to his own use such reasonable expenses as the court shall find to have been necessarily incurred and all costs the court may award against the defendant, to be allowed and taxed according to any provision of law or rule of court in force, or that shall be in force in suits between private parties in said court: Provided, That such person shall be liable for all costs incurred by himself in such case and shall have no claim therefor on the United States.

(F) A subpoena requiring the attendance of a witness at a trial or hearing conducted under sections 231 through 235 of this title and section 5438 of the Revised Statutes may be served at any place in the United States.

31 U.S.C. § 233, Duty of United States attorney as to such cases

It shall be the duty of the several United States attorneys for the respective districts, for the District of Columbia, and for the several Territories, to be diligent in inquiring into any violation of the provisions of section 231 of this title by persons liable to such suit, and found within their respective districts or Territories, and to cause them to be proceeded against in due form of law for the recovery of such forfeiture and damages. And such person may be arrested and held to bail in such sum as the district judge may order, not exceeding the sum of $2,000, and twice the amount of the damages sworn to in the affidavit of the person bringing the suit.

31 U.S.C. § 235, Limitation of suit

Every such suit shall be commenced within six years from the commission of the act, and not afterward.

F. COUNSEL'S LIABILITY FOR EXCESSIVE COSTS, (28 U.S.C. § 1927)

Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and the attorneys' fees reasonably incurred because of such conduct.

III. CRIMINAL STATUTES AFFECTING ANTITRUST PROSECUTIONS

In addition to the Division's criminal enforcement activities under the Sherman Act, there are a number of additional criminal statutes where the conduct in question mandates additional--or related--criminal enforcement. These statutes include other offenses which arise from similar conduct accompanying the Sherman Act violation, including (a) conspiracy to defraud the government (18 U.S.C. § 371); (b) false statements made to governmental entities and officials (18 U.S.C. § 1001); (c) mail fraud (18 U.S.C. § 1341); and (d) wire fraud (18 U.S.C. § 1343).

The second group of criminal statutes are those designed to protect the integrity of the investigatory process. These include: (a) obstruction of justice (18 U.S.C. § 1503); (b) obstruction of proceedings before departments, agencies and committees (18 U.S.C. § 1505) which is employed when there is obstruction of proceedings under the Civil Process Act; (c) obstruction of criminal investigations (18 U.S.C. § 1510); and (d) perjury and false declarations before the grand jury (18 U.S.C. §§ 1621 and 1623(a)).

The final group of statutes are the witness immunity statutes enacted under the Organized Crime Control Act of 1970 (18 U.S.C. §§ 6001-6003).

The full text of these statutes follows.

A. RELATED CRIMINAL OFFENSES PROSECUTED BY THE ANTITRUST DIVISION

Conspiracy to commit offense or to defraud United States, 18 U.S.C. § 371

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

False Statements, 18 U.S.C. § 1001

Statements or entries generally

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Mail Fraud, 18 U.S.C. § 1341

Frauds and swindles

Whoever, having devised or intending or devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

Wire Fraud, 18 U.S.C. § 1343

Fraud by wire, radio, or television

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

B. CRIMINAL OFFENSES TO PROTECT THE INTEGRITY OF THE INVESTIGATIONS AND PROSECUTIONS OF THE ANTITRUST DIVISION

Obstruction of Justice, 18 U.S.C. § 1503

Influencing or injuring officer, juror or witness generally

Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness, in any court of the United States or before any United States commissioner or other committing magistrate, or any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or other committing magistrate, in the discharge of his duty, or injures any party or witness in his person or property on account of his attending or having attended such court or examination before such officer, commissioner, or other committing magistrate, or on account of his testifying or having testified to any matter pending therein, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, commissioner, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

Obstruction of Proceedings Under the Civil Process Act, 18 U.S.C. § 1505

Obstruction of proceedings before departments, agencies, and committees

Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness in any proceeding pending before any department or agency of the United States, or in connection with any inquiry or investigation being had by either House, or any committee of either House, or any joint committee of the Congress; or

Whoever injures any party or witness in his person or property on account of his attending or having attended such proceeding, inquiry, or investigation, or on account of his testifying or having testified to any matter pending therein; or

Whoever, with intent to avoid, evade, prevent, or obstruct compliance, in whole or in part, with any civil investigative demand duly and properly made under the Antitrust Civil Process Act, willfully withholds, misrepresents, removes from any place, conceals, covers up, destroys, mutilates, alters, or by other means falsifies any documentary material, answers to written interrogatories, or oral testimony, which is the subject of such demand; or attempts to do so or solicits another to do so; or

Whoever corruptly, or by threats or force, or by any threatening letter or communication influences, obstructs, or impedes or endeavors to influence, obstruct, or impede the due and proper administration of the law under which such proceeding is being had before such department or agency of the United States, or the due and proper exercise of the power of inquiry under which such inquiry or investigation is being had by either House, or any committee of either House or any joint committee of the Congress--

Shall be fined not more than $5,000 or imprisoned not more than five years, or both.

Obstruction of criminal investigations, 18 U.S.C. § 1510

(a) Whoever willfully endeavors by means of bribery, misrepresentation, intimidation, or force or threats thereof to obstruct, delay, or prevent the communication of information relating to a violation of any criminal statute of the United States by any person to a criminal investigator; or

Whoever injures any person in his person or property on account of the giving by such person or by any other person of any such information to any criminal investigator--

Shall be fined not more than $5,000, or imprisoned not more than five years, or both.

(b) As used in this section, the term "criminal investigator" means any individual duly authorized by a department, agency, or armed force of the United States to conduct or engage in investigations of or prosecutions for violations of the criminal laws of the United States.

Perjury and False Statements, 18 U.S.C. §§ 1621, 1623

Perjury generally, 18 U.S.C. § 1621

Whoever--

(1) having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true; or

(2) in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code, willfully subscribes as true any material matter which he does not believe to be true;

is guilty of perjury and shall, except as otherwise expressly provided by law, be fined not more than $2,000 or imprisoned not more than five years, or both. This section is applicable whether the statement or subscription is made within or without the United States.

False declarations before grand jury or court, 18 U.S.C. § 1623

(a) Whoever under oath (or in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code) in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration or makes or uses any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

(b) This section is applicable whether the conduct occurred within or without the United States.

(c) An indictment or information for violation of this section alleging that, in any proceedings before or ancillary to any court or grand jury of the United States, the defendant under oath has knowingly made two or more declarations, which are inconsistent to the degree that one of them is necessarily false, need not specify which declaration is false if--

(1) each declaration was material to the point in question, and

(2) each declaration was made within the period of the statute of limitations for the offense charged under this section.

In any prosecution under this section, the falsity of a declaration set forth in the indictment or information shall be established sufficient for conviction by proof that the defendant while under oath made irreconcilably contradictory declarations material to the point in question in any proceeding before or ancillary to any court or grand jury. It shall be a defense to an indictment or information made pursuant to the first sentence of this subsection that the defendant at the time he made each declaration believed the declaration was true.

(d) Where, in the same continuous court or grand jury proceeding in which a declaration is made, the person making the declaration admits such declaration to be false, such admission shall bar prosecution under this section if, at the time the admission is made, the declaration has not substantially affected the proceeding, or it has not become manifest that such falsity has been or will be exposed.

(e) Proof beyond a reasonable doubt under this section is sufficient for conviction. It shall not be necessary that such proof be made by any particular number of witnesses or by documentary or other type of evidence.

C. WITNESS IMMUNITY STATUTES

Organized Crime Control Act, § 201(a), 18 U.S.C. § 6001

Definitions

As used in this part--

(1) "agency of the United States" means any executive department as defined in section 101 of title 5, United States Code, a military department as defined in section 102 of title 5, United States Code, the Atomic Energy Commission, the China Trade Act registrar appointed under 53 Stat. 1432 (15 U.S.C. sec. 143), the Civil Aeronautics Board, Commodity Futures Trading Commission, the Federal Communications Commission, the Federal Deposit Insurance Corporation, the Federal Maritime Commission, the Federal Power Commission, the Federal Trade Commission, the Interstate Commerce Commission, the National Labor Relations Board, the National Transportation Safety Board, the Railroad Retirement Board, an arbitration board established under 48 Stat. 1193 (45 U.S.C. sec. 157), the Securities and Exchange Commission, the Subversive Activities Control Board, or a board established under 49 Stat. 31 (15 U.S.C. sec. 715d);

(2) "other information" includes any book, paper, document, record, recording, or other material;

(3) "proceeding before an agency of the United States" means any proceeding before such an agency with respect to which it is authorized to issue subpoenas and to take testimony or receive other information from witnesses under oath; and

(4) "court of the United States" means any of the following courts: the Supreme Court of the United States, a United States court of appeals, a United States district court established under chapter 5, title 28, United States Code, a United States bankruptcy court established under chapter 6, title 28, United States Code, the District of Columbia Court of Appeals, the Superior Court of the District of Columbia, the District Court of Guam, the District Court of the Virgin Islands, the United States Court of Claims, the United States Court of Customs and Patent Appeals, the Tax Court of the United States, the Court of International Trade, and the Court of Military Appeals.

Immunity generally, 18 U.S.C. § 6002

Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to--

(1) a court or grand jury of the United States,

(2) an agency of the United States, or

(3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House,

and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

Court and grand jury proceedings, 18 U.S.C. § 6003

(a) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to a court of the United States or a grand jury of the United States, the United States district court for the judicial district in which the proceeding is or may be held shall issue, in accordance with subsection (b) of this section, upon the request of the United States attorney for such district, an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this part.

(b) A United States attorney may, with the approval of the Attorney General, the Deputy Attorney General, or any designated Assistant Attorney General, request an order under subsection (a) of this section when in his judgment--

(1) the testimony or other information from such individual may be necessary to the public interest; and

(2) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination.

IV. STATUTES THAT AFFECT THE COMPETITION ADVOCACY OF THE ANTITRUST DIVISION

A. STATUTES RELATING TO ANTITRUST IMMUNITIES

1. Agricultural Immunities

Section 6 Clayton Act, 15 U.S.C. § 17

This Act requires, among other things, that the antitrust laws will not forbid the operation of agricultural organizations for mutual assistance purposes. The full text of the Act is found at II-24.

Capper-Volstead Act, 7 U.S.C. § 291

This Act allows persons engaged in the production of agricultural products to act together for the purpose of "collectively processing, preparing for market, handling, and marketing" their products and permits cooperatives to have "marketing agencies in common." The Act also authorizes the Secretary of Agriculture to proceed against cooperatives that monopolize or restrain commerce to such an extent that the price of an agricultural commodity is unduly enhanced.

Agricultural Cooperative Marketing Act of 1926, 7 U.S.C. § 455

This Act authorizes agricultural producers and associations to acquire and exchange past, present, and prospective pricing, production, and marketing data.

Agricultural Adjustment Act of 1935, 7 U.S.C. § 608

This Act provides that the Secretary of Agriculture is authorized to enter into marketing agreements with producers and processors of agricultural commodities. These arrangements are specifically exempted from the application of the antitrust laws. Under the Act, the Secretary may also enter into marketing orders that, except for milk, control the amount of an agricultural product reaching the market and thus serve to enhance the price. Milk marketing orders differ from other orders since they provide a mechanism for the establishment of a minimum price for milk rather than establishing levels of maximum output.

2. Export Trade Immunities

Export Trading Company Act of 1982, 15 U.S.C. § 4000, et seq.

This Act provides antitrust immunity for export trade, export trade activities and methods of operation specified in a certificate of review issued by the Secretary of Commerce with the concurrence of the Attorney General. To obtain the certificate a person must show that the proposed activities:

(1) will neither substantially lessen competition or restrain trade in the United States nor substantially restrain the export trade of any competitor of the applicant;

(2) will not unreasonably enhance, stabilize, or depress prices in the United States of the class of goods or services exported by the applicant;

(3) will not constitute unfair methods of competition against competitors engaged in the export of the class of goods or services exported by the applicant; and

(4) will not include any act that may reasonably be expected to result in the sale for consumption or resale in the United States of the goods or services exported by the applicant.

A certificate may be revoked or modified by the Secretary of Commerce if he or the Attorney General determines that the applicant's activities no longer comply with these standards. While a certificate is in effect, the persons named in it are immune from federal or state antitrust liability with respect to the conduct specified. However, parties injured by the conduct may sue for actual damages on the ground that the conduct does not comply with the statutory criteria set forth above. In addition, the Attorney General may sue under Section 15 of the Clayton Act "to enjoin conduct threatening a clear and irreparable harm to the national interest."

2. Export Trade Immunities (cont'd)

Webb-Pomerene Export Trade Association Act, 15 U.S.C. §§ 61-65

This statute provides antitrust immunity for the formation and operation of associations of otherwise competing businesses to engage in collective export sales. The immunity conferred by this statute does not extend to actions that have an anticompetitive effect within the United States or that injure domestic competitors of members of the export association.

3. Insurance Immunities

McCarran-Ferguson Act, 15 U.S.C. § 1011, et seq.

The Act exempts from the antitrust laws the "business of insurance" to the extent "regulated by state law." The Sherman Act continues to be applicable to all agreements or acts by those engaged in the "business of insurance" to boycott, coerce, or intimidate.

Merchant Marine Act of 1920, 46 U.S.C. § 885

This Act provides antitrust immunity to associations of marine insurance companies to transact marine insurance and to apportion risks among their members.

4. Labor Immunities

Section 6 Clayton Act, 15 U.S.C. § 17

This Act provides that the labor of a human being is not a commodity or article of commerce. The Act permits labor organizations to carry out their legitimate objectives. The full text of the statute is found at II-24.

Norris-LaGuardia Act of 1932, 29 U.S.C. §§ 102, 104-105

This Act provides that courts in the United States do not have jurisdiction to issue restraining orders or injunctions against certain union activities on the basis that such activities constitute an unlawful combination or conspiracy under the antitrust laws.

5. Fishing Immunities

Fishermen's Collective Marketing Act, 15 U.S.C. §§ 521-522

This Act permits persons engaged in the fisheries industry as fishermen to act together for the purpose of catching, producing, preparing for market, processing, handling and marketing their products. This immunity is patterned after the Capper-Volstead Act. This Act also provides for the enforcement by the Department of Justice of cease and desist orders issued by the Secretary of the Interior if interstate or foreign commerce is restrained or monopolized by any association of persons engaged in the fisheries industry as fishermen.

6. Defense Preparedness

Defense Production Act of 1950, 50 U.S.C. App. § 2158

This Act provides that the President or his delegate, in conjunction with the Attorney General, may approve voluntary agreements among various industry groups for the development of preparedness programs to meet potential national emergencies. Persons participating in such agreements are immunized from the operation of the antitrust laws with respect to good faith activities undertaken to fulfill their responsibilities under the agreement. The December 1975 amendments to the legislation substantially strengthen the antitrust safeguards surrounding the formulation and operation of these agreements.

7. Newspaper Joint Operating Arrangements

Newspaper Preservation Act of 1970, 15 U.S.C. §§ 1801-1804

This Act provides a limited exemption for joint operating arrangements between newspapers to share production facilities and combine their commercial operations. The newspapers are required to retain separate editorial and reporting staffs and to determine independently their editorial policies.

8. Professional Sports

Sports Broadcasting Act of 1961, 15 U.S.C. §§ 1291-1295

This Act provides that professional football, baseball, basketball, and hockey teams are permitted to jointly negotiate, through their leagues, for the sale of television rights.

9. Small Business Joint Ventures

Small Business Act, 15 U.S.C. §§ 638-640

This Act requires the Department of Justice to make, or requires the Federal Trade Commission to make, surveys of any government activity affecting small business, for the purpose of determining factors that might be anticompetitive or otherwise harmful to small business, and to submit to Congress an annual report pertaining to such surveys. The Act also provides that, after consultation with the Small Business Administrator on the antitrust aspects of the issue, the Department may approve agreements between small business concerns providing for joint programs of research and development if the Small Business Administrator finds such programs will strengthen free enterprise and the economy. The Department may also approve voluntary agreements or programs among small business concerns to further the objectives of the Small Business Act found to be in the public interest as contributing to national defense.

B. STATUTES RELATING TO THE REGULATED INDUSTRIES COMPETITION ADVOCACY ACTIVITIES OF THE ANTITRUST DIVISION

The following statutes are among those that have a direct impact upon the regulatory activities of the Antitrust Division. Although this list is not exhaustive, it is suggestive of the major areas of federal regulation in certain industries with which the Division is especially concerned.

1. Banking

Bank Merger Act, 12 U.S.C. § 1828

This Act requires that planned bank mergers not be consummated until 30 days after the date of approval by the appropriate banking agency. If a suit under the antitrust laws is not instituted during the 30-day period, the merger may be consummated and thereafter will be exempt from such suits except suits brought under Section 2 of the Sherman Act.

Bank Holding Company Act, 12 U.S.C. § 1841, et seq.

This Act provides that the Federal Reserve Board shall notify the Attorney General of its approval of any acquisition by, or merger or consolidation of, a bank holding company and that such transaction shall not take place until 30 days after the Board's approval. During that period, in the case of the acquisition of a bank by a bank holding company, the Antitrust Division will consider the competitive effects of the acquisition or merger. If the Division does not institute suit under the antitrust laws during this 30-day period, the transaction may be consummated and thereafter will be exempt from such suits except suits brought under Section 2 of the Sherman Act.

Federal Deposit Insurance Act, 12 U.S.C. § 1828

This Act requires that the Department of Justice report to the Comptroller of Currency, the Board of Governors of the Federal Reserve System, or the Federal Deposit Insurance Corporation on any competitive factors involved in any proposed merger, consolidation, acquisition of assets, or assumption of liabilities of any bank insured by the Federal Deposit Insurance Corporation.

2. Communications

Communications Act of 1934, 47 U.S.C. § 151, et seq.

This Act establishes the Federal Communications Commission, which is responsible for regulating the common carrier communications of the telephone industry, radio and television broadcasting, and other communications businesses. Under Section 402(a) of the Act, the Antitrust Division, representing the United States, is automatically a party respondent in most appeals from FCC common carrier and rule making actions. The statute also provides that the FCC has very limited authority to immunize conduct from the antitrust laws; such immunities relate to telephone and telegraph mergers.

3. Foreign Trade

Section 337 of the Tariff Act of 1930, 19 U.S.C. § 1337

By this Act, the International Trade Commission determines whether there have been unfair import practices involving the importation of articles into the United States. The ITC is required to seek the Department's advice before making a final determination. The Department also participates in the interagency group that prepares a recommendation for the President whether to accept the ITC finding and proposed relief.

Sections 201, 301, and 406 of the Trade Act of 1974, 19 U.S.C. §§ 2251, 2411, 2436

Section 201 of this Act, 19 U.S.C. § 2251, provides that American businesses claiming injury caused by lower tariffs and other legal changes which result in increased imports may petition the International Trade Commission for relief or modification under the so-called "escape clause." Once the ITC makes a determination of whether such injury occurred and formulates appropriate relief, the Department participates in the interagency committee that makes recommendations to the President whether to institute or modify the import relief urged by the ITC.

Section 301, 19 U.S.C. § 2411, provides that the President may take action including restricting imports, to enforce rights of the United States under any trade agreement or to respond to unfair practices of foreign governments that restrict U.S. commerce. Interested parties may initiate such actions through petitions to the U.S. Trade Representative. The Department participates in the interagency committee that makes recommendations to the President on what actions, if any, should be taken.

Section 406, 19 U.S.C. § 2436, provides that businesses claiming injury relating to imports from communist countries may also petition the ITC under the so-called "market disruption statute." The Department participates in the interagency committee that makes recommendations to the President whether to institute or alter the import relief urged by the ITC.

Section 232 of the Trade Expansion Act of 1962, 19 U.S.C. § 1862

Under this statute, the President shall take actions to control any imports that the President and the Secretary of Commerce determine are threatening to impair national security because of their impact on defense-related domestic producers. Interested parties may initiate these actions through petitions to the Secretary of Commerce. The Department participates in the interagency committee that makes recommendations to the President on what actions, if any, should be taken.

Wilson Tariff Act, 15 U.S.C. §§ 8-11

This Act is not part of any regulatory scheme; it is a substantive antitrust law in the foreign trade area. The act provides that every combination, conspiracy, trust, agreement or contract contrary to public policy made between two persons engaged in importing goods into the United States is illegal and is a criminal violation of the law.

4. Energy

Department of Energy Organization Act, 42 U.S.C. § 7101, et seq.

This Act provides for the organization of the Department of Energy and the transfer of functions from other agencies to that Department. The Act determines that it is in the national interest to promote the interest of consumers through the provision of an adequate and reliable supply of energy at the lowest reasonable cost and to foster and assure competition among parties engaged in the supply of energy and fuels.

The Act established the Federal Energy Regulatory Commission as an independent regulatory commission within the Department of Energy. FERC establishes rates for the transmission and sale of electric energy and the transportation and sale of natural gas; it also regulates gas and oil pipelines. FERC has authority to regulate mergers and acquisitions under the Federal Power Act and the Natural Gas Act.

The Antitrust Division often intervenes as a competition advocate in FERC proceedings and in other proceedings involving Department of Energy activities.

Atomic Energy Act of 1954, 42 U.S.C. § 2135

Under this Act, the Department is required to advise the Nuclear Regulatory Commission whether granting a license as proposed or certifying a plant would create or maintain a situation consistent with the antitrust laws.

Deepwater Port Act of 1974, 33 U.S.C. § 1506(a)

The Act requires that the Attorney General provide the Secretary of Transportation with an opinion as to whether the Secretary's determination that the granting of a deepwater port license would adversely affect competition, restrain trade, promote monopolization, or otherwise create a situation in contravention of the antitrust laws.

Energy Policy and Conservation Act of 1975, 42 U.S.C. § 6272

Under this Act, an antitrust defense is created for activities undertaken by international petroleum firms in fulfilling their obligations under a voluntary plan supervised by the International Energy Agency for the sharing of petroleum during an embargo or other supply interruption. The formulation and implementation of these proposals are subject to review by the Attorney General and the Federal Trade Commission, and such activities are monitored by each agency.

Federal Coal Leasing Amendments Act of 1976, 30 U.S.C. § 181, et seq.

Under this Act, the Department is required to prepare an annual report on the state of competition in the coal industry (30 U.S.C. § 208-2). The Department also reviews the issuance, renewal or modification of federal coal leases.

Outer Continental Shelf Lands Act, 43 U.S.C. § 1331, et seq.

The Act requires that the Departments of the Interior and Energy consult with the Attorney General regarding offshore lease analysis, pipeline rights of entry, review of lease transfers, and review of regulations and plans that the Departments of the Interior and Energy formulate for offshore leasing that may affect competition in the acquisition and transfer of offshore leases.

Naval Petroleum Reserves, 10 U.S.C. § 7430(g), (h) and (i)

This 1980 Amendment requires the Secretary of Energy to consult with and give due consideration to the views of the Attorney General prior to promulgating any rules and regulations or plans of development and amendments thereto, and prior to entering into contracts or agreements for the production or sale of petroleum from the naval petroleum and oil shale reserves. If the Attorney General advises the Secretary within the 30 days allowed for review that any proposed contract or agreement would create or maintain a situation inconsistent with the antitrust laws, then the Secretary may not enter into that contract or agreement. The Attorney General is also required to report on the competitive effects of any plans or substantial amendments to ongoing plans for the exploration, development, and production of the naval petroleum and oil shale reserves.

Naval Petroleum Reserves Production Act of 1976, 42 U.S.C. § 6504(d)

This Act provides that no contract for the exploration of the National Petroleum Reserve in Alaska may be executed by the Secretary of the Interior if the Attorney General advises the Secretary within the 30 days allowed for review, that such contract would unduly restrict competition or be inconsistent with the antitrust laws. The Attorney General is also required to report on the competitive effects of any new plans or substantial amendments to ongoing plans for the exploration of the reserve. Whenever development leading to production of petroleum is authorized, the provisions of 10 U.S.C. § 7430(g), (h) and (i) apply.

5. Transportation

Interstate Commerce Act, 49 U.S.C. § 81, et seq.

Until 1976, this Act authorized the Interstate Commerce Commerce Commission to exercise regulatory control over entry, rates, routings, classifications, intercarrier mergers and collective ratemaking activities, which the ICC could approve and immunize from antitrust exposure. Since 1976, a variety of deregulation statutes have significantly diminished the ICC's authority in all of these areas so as to require the ICC to give primary weight to competitive solutions and permit carrier managements to be primarily responsible for decision making in the surface transportation industries. These statutes are: the Railroad Revitalization and Regulatory Reform Act of 1976 (4R Act), Pub. L. No. 94-210, 90 Stat. 31 (1976); the Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793 (1980); the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 (1980); and the Bus Regulatory Reform Act of 1982, Pub. L. No. 97-261, 96 Stat. 1102 (1982).

Federal Aviation Act, 49 U.S.C. §§ 1378-84

Until 1978, the Civil Aeronautics Board exercised extensive regulatory control over entry, fares, mergers, interlocking directorates and agreements among air carriers.

In 1978, Congress passed the Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (1978), providing initially for substantial liberalization of regulatory approval standards for those matters regulated by the CAB and thereafter for phased sunset of virtually all CAB functions.

The sunset provisions have begun to take effect, and CAB no longer exercises any control over air carrier entry decisions. As of January 1, 1983, the CAB will lose all regulatory control over air carrier pricing decisions. In 1985, pursuant to the sunset schedule contained in the Airline Deregulation Act, other CAB functions will be sunset and still other functions will be transferred to other government agencies. On January 1, 1985, the Department of Justice is scheduled to inherit approval authority over air carrier mergers as well as intercarrier agreements.

Countervailing Duties, 19 U.S.C. § 1671

This statute provides that American manufacturers, producers, wholesalers, unions and trade associations may petition for the imposition of offsetting duties on subsidized foreign imports. Duties will be imposed if the Department of Commerce determines that a foreign country is subsidizing the foreign import and, in most cases, if the International Trade Commission determines that a domestic industry is materially injured or threatened with injury by the foreign merchandise. The Antitrust Division may participate as an interested party in proceedings before the International Trade Commission.

Antidumping, 19 U.S.C. § 1673

This statute provides that antidumping duties shall be imposed on foreign merchandise that is being, or is likely to be, sold in the United States at "less than fair value," if the International Trade Commission determines that a domestic industry is materially injured or threatened with material injury by imports of the foreign merchandise. The Antitrust Division may participate as an interested party in proceedings before the International Trade Commission.

Shipping Act of 1916, 46 U.S.C. §§ 813-814

The Act provides that the Federal Maritime Commission may approve the participation of domestic ocean carriers in international rate-making conferences. Commission-approved conferences are immunized from the operation of the antitrust laws.

Federal Property and Administrative Services Act, 40 U.S.C. § 488

This Act provides that the Attorney General give antitrust advice on the sale of surplus government property having an acquisition cost of $3 million or more, and the sale of surplus government real property having an acquisition value of $1 million or more.

V. ANTITRUST DIVISION GUIDELINES

Two official sets of guidelines have been issued by the Antitrust Division which bear directly on Division policy in the merger area and in criminal sentencing. The Merger Guidelines, which were issued on June 14, 1982, by Attorney General William French Smith, replace the guidelines that were issued on May 30, 1968, by Attorney General Ramsey Clark. The Merger Guidelines were designed to outline the Division's standards for determining whether to oppose mergers or acquisitions under Section 7 of the Clayton Act.

The Guidelines for Sentencing Recommendations in Felony Cases Under the Sherman Act were issued on February 24, 1977, by Assistant Attorney General Donald I. Baker. The Sentencing Guidelines were intended to outline the Division's views of sentence recommendations following the 1974 amendments to the Sherman Act, that made criminal violation of the Act a felony.

The text of the Merger and Sentencing Guidelines follow.

I. PURPOSE AND UNDERLYING POLICY ASSUMPTIONS

These Guidelines state in outline form the present enforcement policy of the U.S. Department of Justice ("Department") concerning acquisitions and mergers ("mergers") subject to section 7 of the Clayton Act 1/ or to section 1 of the Sherman Act. 2/ They describe the general principles and specific standards normally used by the Department in analyzing mergers. 3/ By stating its policy as simply and clearly as possible, the Department hopes to reduce the uncertainty associated with enforcement of the antitrust laws in this area.

Although the Guidelines should improve the predictability of the Department's merger enforcement policy, it is not possible to remove the exercise of judgment from the evaluation of mergers under the antitrust laws. Difficult factual questions arise under the standards stated below, and the Department necessarily will base its decision on the data that are practicably available in each case. Moreover, the standards represent generalizations to which some exceptions are inevitable. In appropriate cases, the Department will challenge mergers that are competitively objectionable under the general principles of the Guidelines regardless of whether they are covered by the specific standards. Finally, the Guidelines are designed primarily to indicate when the Department is likely to challenge mergers, not how it will conduct the litigation of cases that it decides to bring. Although relevant in the latter context, the factors contemplated in the standards do not exhaust the range of evidence that the Department may introduce in court. 4/

1/ 15 U.S.C.A. § 18 (1981). Mergers subject to section 7 are prohibited if their effect "may be substantially to lessen competition, or to tend to create a monopoly."

2/ 15 U.S.C.A. § 1 (1981). Mergers subject to section 1 are prohibited if they constitute a "contract, combination . . ., or conspiracy in restraint of trade."

3/ They replace a set of Guidelines issued by the Department in 1968, and are subject to further revision in light of subsequent judicial decisions or economic studies. Although changes in enforcement policy may precede the issuance of amended Guidelines, the Department will attempt to conform the Guidelines to such changes as soon as possible.

4/ Parties seeking more specific advance guidance concerning the Department's enforcement intentions with respect to any particular merger should consider using the Business Review Procedure. 28 C.F.R. § 50.6.

The unifying theme of the Guidelines is that mergers should not be permitted to create or enhance "market power" or to facilitate its exercise. A sole seller (a "monopolist") of a product with no good substitutes can maintain a selling price that is above the level that would prevail if the market were competitive. Where only a few firms account for most of the sales of a product, those firms can in some circumstances coordinate, explicitly or implicitly, their actions in order to approximate the performance of a monopolist. This ability of one or more firms profitably to maintain prices above competitive levels for a significant period of time is termed "market power." Sellers with market power also may eliminate rivalry on variables other than price. In either case, the result is a transfer of wealth from buyers to sellers and a misallocation of resources. 5/

Although they sometimes harm competition, mergers generally play an important role in a free enterprise economy. They can penalize ineffective management and facilitate the efficient flow of investment capital and the redeployment of existing productive assets. While challenging competitively harmful mergers, the Department seeks to avoid unnecessary interference with that larger universe of mergers that are either competitively beneficial or neutral. In attempting to mediate between these dual concerns, however, the Guidelines reflect the congressional intent that merger enforcement should interdict competitive problems in their incipiency.

II. MARKET DEFINITION AND MEASUREMENT

Using the standards stated below, the Department will define and measure the market for each product or service ("product") of each of the merging firms. A market is a group of products and an associated geographic area with certain economic characteristics that will be described in subsequent paragraphs. In theory, all the demand and supply forces relevant to the evaluation of a merger could be incorporated in the definition of a market. Under the Guidelines, however, market definition is not the exclusive analytical technique through which the Department considers those forces. For example, because the potential new entry from the construction of new facilities and from the substantial modification of existing facilities

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5/ "Market power" also encompasses the ability of a single buyer or group of buyers to depress the price paid for a product to a level that is below the competitive price. Market power by buyers has wealth transfer and resource misallocation effects analogous to those associated with market power by sellers.

is not easily captured in conventional market statistics, the Department takes such entry into account in interpreting market statistics. 6/ Taken as a whole, however, the standards in the Guidelines are designed to ensure that, whenever the Department challenges a merger, the firms in the affected market could exercise market power if they were able to coordinate their actions.

A. Product Market Definition

The first task in market definition is to determine what products to include in the market for the product of the merging firm. 7/ In general, the Department seeks to identify a group of products such that a hypothetical firm 8/ that was the only present and future seller of those products could raise price profitably. That is, assuming that buyers could respond to an increase in price for a tentatively identified product group only by shifting to other products, what would happen? If readily available alternatives were, in the aggregate, sufficiently attractive to enough buyers, an attempt to raise price would not prove profitable, and the "market" would prove to have been too narrowly defined.

Taking the product of the merging firm as a beginning point, the Department will establish a provisional product market. The Department will include in the provisional market those products that the merging firm's customers view as good

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6/ In contrast to the comprehensive definition suggested in this paragraph of the text, the market definition used by the Department can be stated formally as follows: "a market consists of a group of products and an associated geographic area such that (in the absence of new entry) a hypothetical, unregulated firm that made all the sales of those products in that area could increase its profits through a small but significant and non-transitory increase in price (above prevailing or likely future levels)." The standards for market definition in the text below implement this definition.

7/ The analysis that follows will be repeated for each product of each merging firm.

8/ In Sections III(A) and III(C), the Guidelines discuss factors affecting the ability of a group of sellers, by coordinating their actions, to approximate the performance of a single firm.

substitutes at prevailing prices. 9/ The potential weakness of such a market based solely on existing patterns of supply and demand is that those patterns might change substantially if the prices of the products included in the provisional market were to increase. For this reason, the Department will test further and, if necessary, expand the provisional market. The Department will add additional products to the market if a significant percentage of the buyers of products already included would be likely to shift to those other products in response to a small but significant and non-transitory increase in price. As a first approximation, the Department will hypothesize a price increase of five percent and ask how many buyers would be likely to shift to the other products within one year. 10/ The Department will continue expanding the provisional market until it satisfies the general profitability standard stated above. 11/

9/ On occasion, the Department may base this analysis on likely future prices, provided that the relevant price relationships can be projected with confidence.

10/ The purpose of hypothesizing a price increase is to interject a dynamic element in the analysis as a conceptual aid in determining the outer limits of the market. Judged by the effect on rate of return on invested capital, a given percentage price increase may be much more significant in some industries than in others.

Direct evidence of the likely effect of a price increase often will not be available, particularly in the context of the Department's prelitigation evaluation of a merger. As a result, the Department often will have to rely on inferences from the types of circumstantial evidence described in the text below. For consistency, the Department will assume that buyers and sellers immediately recognize the price increase and believe that it will be sustained for the foreseeable future.

11/ The Department normally will not expand the market beyond the point at which this standard is satisfied unless it is convinced that independent competitive concerns exist in a larger market.

In evaluating product substitutability, 12/ the Department will consider any relevant evidence, but will give particular weight to the following factors:

1) Evidence of buyers' perceptions that the products are or are not substitutes, particularly if those buyers have shifted purchases between the products in response to changes in relative price or other competitive variables;

2) Similarities or differences between the products in customary usage, design, physical composition and other technical characteristics:

3) Similarities or differences in the price movements of the products over a period of years; and

4) Evidence of sellers' perceptions that the products are or are not substitutes, particularly if business decisions have been based on those perceptions.

The analysis of product market definition to this point has assumed that price discrimination--charging different buyers different prices for products having the same cost, for example--would not be possible after the merger. Existing buyers sometimes will differ significantly in their assessment of the adequacy of a particular substitute and the ease with which they could substitute it for the product of the merging firm. Even though a general increase in price might cause such significant substitution that it would not be profitable, sellers who can price discriminate could raise price only to groups of buyers who cannot easily substitute away. 13/ If such price discrimination is possible, the Department will consider defining

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12/ In constructing and expanding the provisional market, the Department will not exclude any product that is at least as good a substitute as any product included. The Department will refer to the products included in the market collectively as the "relevant product."

13/ Price discrimination requires that sellers be able to identify those buyers and that other buyers be unable profitably to purchase and resell to them.

additional, narrower relevant product markets oriented to the buyer groups subject to the exercise of market power. 14/

B. Identification of Firms that Produce the Relevant Product

In most cases, the Department's evaluation of a merger will focus primarily on firms that currently produce and sell the relevant product. In addition to those firms, however, the Department may include additional firms in the market in certain circumstances. 15/

1. Production Substitution. The same productive and distributive facilities can sometimes be used to produce and sell two or more products that buyers do not regard as good substitutes. Production substitution refers to the shift by a firm in the use of facilities from producing and selling one product to producing and selling another. Depending upon the cost and speed of that shift, production substitution may allow firms that do not currently produce the relevant product

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14/ Price discrimination is discussed in the Guidelines because it is sometimes a manifestation of market power created by a merger. In the context described in the text, a price increase to one group, will not be accompanied by a price reduction and output increase to the other group. Hence, its effects on consumer welfare are unambiguously negative. It is important to distinguish that situation from the one in which a firm already possesses market power and is likely to exercise it, whether or not it is able to practice price discrimination. In the latter situation, price discrimination often results in an expansion of output, thus reducing the resource misallocation associated with market power.

15/ The situations described in the text below are particularly subject to difficult questions of degree. In such cases, it is often useful to calculate market shares based on alternative reasonable assumptions--for example, with and then without a particular type of facility arguably capable of easy and economical production substitution. In its evaluation of such cases, the Department will take into account the closeness of the issue, whichever way it is resolved for calculation of market statistics.

to respond effectively to an increase in the price of that product. 16/

If a firm has existing productive and distributive facilities that could easily and economically be used to produce and sell the relevant product within six months in response to a small but significant and non-transitory increase in price, the Department will include those facilities in the market. 17/ As a first approximation, the Department will hypothesize a price increase of five percent and ask how many firms would be likely to change to the production and sale of the relevant product within six months. 18/ Firms that must construct significant new productive or distributive facilities in order to produce and sell the relevant product will not be included in the market, although the Department will consider their competitive significance in evaluating entry conditions generally. 19/

2. Durable Products. Some long-lived products may continue to exert competitive influence after the time of original sale. If, under the standards stated in Section II(A), recycled or reconditioned products represent good substitutes for new products, the Department will include in the market firms which recycle or recondition those products.

16/ Under other analytical approaches, production substitution sometimes has been reflected in the description of the product market. For example, the product market for stamped metal products such as automobile hub caps might be described as "light metal stamping," a production process rather than a product. The Department believes that the approach described in the text provides a more clearly focused method of incorporating this factor in merger analysis. If production substitution among a group of products is nearly universal among the firms selling one or more of those products, however, the Department may use an aggregate description of those markets as a matter of convenience.

17/ The amount of sales or capacity to be included in the market is a separate question discussed in Section II(D), below.

18/ See note 10, above.

19/ See Section III(B), below.

3. Internal Consumption. Captive production and consumption of the relevant product by vertically integrated firms are part of the overall market supply and demand. Such firms are free to buy or sell in the market, and they incur an opportunity cost for units they consume rather than sell. The increase in that cost resulting from an increase in the market price may induce a change in behavior. The Department will include in the market the facilities that are used to produce the relevant product. 20/

C. Identification of Firms that Produce the Relevant Product at Relevant Locations (Geographic Market Definition)

For each product market of each merging firm, the Department will determine the geographic market(s) in which that firm sells. The purpose of geographic market definition is to establish a geographic boundary that roughly separates firms that are important factors in the competitive analysis of a merger from those that are not. Depending on the nature of the product, the geographic market may be as small as a part of a city or as large as the entire world. Moreover, a single firm may operate in a number of economically discrete geographic markets.

In general, the Department seeks to identify a geographic area such that a hypothetical firm that was the only present or future producer of the relevant product in that area could profitably raise price. That is, assuming that buyers could respond to a price increase within a tentatively identified area only by shifting to firms located outside the area, what would happen? If firms located elsewhere readily could provide the relevant product to the hypothetical firm's buyers in sufficient quantity at a comparable price, an attempt to raise price would not prove profitable, and the "market" would prove to have been too narrowly defined.

20/ See note 17, above. In evaluating the competitive significance of internally consumed production, the Department will consider whether the vertically integrated firm, either through sales of the relevant product or through sales of the products in which the relevant product is embodied, could frustrate an effort by the sellers of the relevant product to exercise market power.

Taking the location of the merging firm (or each plant for multi-plant firms) as a beginning point, the Department will establish a provisional geographic market based upon the shipment patterns of that firm and its closest competitors. 21/ The potential weakness of such a market boundary based on existing patterns of supply and demand is that those patterns might change substantially if the price within the provisional market were to increase. For this reason, the Department will test further and, if necessary, expand the provisional market. The Department will expand the provisional market boundaries to include the locations of firms (or plants) that could make significant sales to customers of firms previously included in the provisional market in response to a small but significant and non-transitory increase in price. As a first approximation, the Department will hypothesize a price increase of five percent and ask how many sellers could sell the product to such customers within one year. 22/ The Department will continue expanding the provisional market until it satisfies the general profitability standard stated above. 23/

21/ Because the definition of geographic markets in the Guidelines is an area derived from the location of sellers' facilities, the area may not always exhibit characteristics associated with traditional geographic market definitions that are based, in whole or part, on buyer locations. Nevertheless, as a rule of thumb, the merging firm should make a significant percentage of its sales in the provisional market and firms located outside it collectively should account for a small percentage of total sales there. It is possible that a geographic market could include only one firm.

22/ See note 10, above. In some cases, a general expansion of the market boundaries may overstate the likely supply response. If a specific firm has a particular ability to sell in the provisional market that is not shared by other firms in that firm's area, the Department will treat that firm alone as being in the market.

23/ See note 11, above.

In evaluating geographic substitutability, 24/ the Department will consider any relevant evidence, but will give particular weight to the following factors:

1) Evidence of buyers actually having shifted their purchases among sellers at different geographic locations, especially if the shifts corresponded to changes in relative price or other competitive variables;

2) Similarities or differences in the price movements of the relative product in different geographic areas over a period of years;

3) Transportation costs;

4) Costs of local distribution; and

5) Excess capacity by firms outside the provisional market.

The analysis of geographic market definition to this point has assumed that geographic price discrimination--charging different prices net of transportation costs for the same product to buyers in different locations, for example--would not be possible after the merger. As in the case of product market definition, however, where price discrimination is possible, 25/ the Department will consider defining additional, narrower geographic markets oriented to those buyer groups subject to the exercise of market power.

In general, the standards stated above will govern geographic market definition, whether domestic or international. The Department, however, will be somewhat more cautious, both in expanding market boundaries beyond the United States and in assessing the likely supply response of specific foreign firms.

24/ In constructing and expanding the provisional market, the Department will not exclude any area if production there is at least as good a substitute as production that is included.

25/ See notes 13-14, above. Geographic price discrimination against a group of buyers is more likely when other buyers cannot easily purchase and resell the relevant product to them. Such arbitrage is particularly difficult where the product is sold on a delivered basis and where transportation costs are a significant percentage of the final cost.

Although firms located outside the United States may exert an important competitive influence on domestic prices, they may be subject to additional constraints not present in the purely domestic context. For example, changes in exchange rates, tariffs, and general political conditions may limit the ability of such firms to respond to domestic price increases.

D. Calculating Market Shares

The Department normally will include in the market the total sales or capacity 26/ of all firms (or plants) that are identified as being in the market in Sections II(B) and II(C). In some cases, however, total sales or capacity may overstate the competitive significance of a firm. With respect to firms included in the market under Sections II(B)(1) (production substitution) and II(B)(3) (internal consumption), for example, the Department will include only those sales likely to be made or capacity likely to be used in the geographic market in response to a small but significant and non-transitory increase in price. As a first approximation, the Department will hypothesize a price increase of five percent and ask what the likely response of the firms would be within one year. 27/

Similarly, a firm's capacity may be so committed elsewhere that it would not be available to respond to an increase in price in the market. In such cases, the Department also may include a smaller part of the firm's sales or capacity.

26/ Market shares can be expressed in terms of dollar sales, physical unit sales, physical capacity, or (in natural resource industries) physical reserves. The availability of data often will determine the measurement base. Where a choice is possible, the Department will use the measurement base that is the best indicator of the likely effect of the merger on market power.

27/ See note 10, above. It follows that some firms included in the market might have little or no sales or capacity attributed to them. Conversely, the present sales or capacity of a firm may understate its competitive significance. This effect is most likely in the acquisition of new or as-yet-unexploited patent rights.

III. HORIZONTAL MERGERS

Where the merging firms are in the same product and associated geographic market, the merger is horizontal. In such cases, the Department will focus first on the post-merger concentration of the market and the market shares of the merging firms. In some cases with low post-merger market concentration and/or market shares, the Department will be able to determine without a detailed examination of other factors that the merger poses no significant threat to competition. In other cases, however, the Department will proceed to examine a variety of other factors relevant to that question.

A. Concentration and Market Share

Market concentration is a function of the number of firms in a market and their respective market shares. 28/ Other things being equal, concentration affects the likelihood that one firm, or a small group of firms, could successfully exercise market power. The smaller the percentage of total supply that a firm controls, the more severely it must restrict its own output in order to produce a given price increase, and the less likely it is that an output restriction will be profitable. Where collective action is necessary, an additional constraint applies. As the number of firms necessary to control a given percentage of total supply increases, the difficulties and costs of reaching and enforcing consensus with respect to the control of that supply also increase.

As an aid to the interpretation of market data, the Department will use the Herfindahl-Hirschman Index ("HHI") of market concentration. The HHI is calculated by summing

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28/ Markets can range from atomistic, where very large numbers of firms that are small relative to the overall size of the market compete with one another, to monopolistic, where one firm controls the entire market. Far more common, and more difficult analytically, is the large middle range of instances where a relatively small number of firms account for most of the sales in the market.

the squares of the individual market shares of all the firms included in the market under the standards in Section II. 29/ Unlike the traditional four-firm concentration ratio, the HHI reflects both the distribution of the market shares of the top four firms and the composition of the market outside the top four firms. It also gives proportionately greater weight to the market shares of the larger firms, which probably accords with their relative importance in any collusive interaction.

The Department divides the spectrum of market concentration as measured by the HHI into three regions that can be broadly characterized as unconcentrated (HHI below 1000), moderately concentrated (HHI between 1000 and 1800) and highly concentrated (HHI above 1800). An empirical study by the Department of the size dispersion of firms within markets indicates that the critical HHI thresholds at 1000 and 1800 correspond roughly to four-firm concentration ratios of 50 percent and 70 percent, respectively. Although the resulting regions provide a useful format for merger analysis, the numerical divisions suggest greater precision than is possible with the available economic tools and information. Other things being equal, cases falling just above and just below a threshold present comparable competitive concerns.

1. General Standards. In evaluating horizontal mergers, the Department will consider both the post-merger market concentration and the increase in concentration resulting from the merger. 30/ The link between concentration and market power

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29/ For example, a market consisting of four firms with market shares of 30 percent, 30 percent, 20 percent and 20 percent has an HHI of 2600 ($30^2 + 30^2 + 20^2 + 20^2 = 2600$). The HHI ranges from 10,000 (in the case of a pure monopoly) to a number approaching zero (in the case of an atomistic market). Although it is desirable to include all firms in the calculation, lack of information about small fringe firms is not critical because such firms do not affect the HHI significantly.

30/ The increase in concentration as measured by the HHI can be calculated independently of the overall market concentration by doubling the product of the market shares of the merging firms. For example, the merger of firms with shares of 5 percent and 10 percent of the market would increase the HHI by 100 ($5 \times 10 \times 2 = 100$). [The explanation for this technique is as follows: In calculating the HHI before the merger, the market shares of the merging firms are squared individually. Thus: $(a)^2 + (b)^2$. After the merger, the sum of those shares would be squared. Thus: $(a + b)^2$, which equals $a^2 + 2ab + b^2$. The increase in the HHI therefore is represented by 2ab.]

is explained above. The increase in concentration is relevant to several key issues. Although mergers among small firms increase concentration, they are less likely to have anticompetitive consequences. Moreover, even in concentrated markets, it is desirable to allow firms some scope for merger activity in order to achieve economies of scale and to permit exit from the market.

The general standards for horizontal mergers are as follows:

a) Post-Merger HHI Below 1000. Markets in this region generally would be considered to be unconcentrated, having the equivalent of at least 10 equally sized firms. Because implicit coordination among firms is likely to be difficult and because the prohibitions of section 1 of the Sherman Act are usually an adequate response to any explicit collusion that might occur, the Department is unlikely to challenge mergers falling in this region.

b) Post-Merger HHI Between 1000 and 1800. Because this region extends from the point at which the competitive concerns associated with concentration become significant to the point at which they become quite serious, generalization is particularly difficult. The Department, however, is unlikely to challenge mergers producing an increase in the HHI of less than 100 points. 31/ The Department is more likely than not to challenge mergers in this region that produce an increase in the HHI of more than 100 points. In making that decision, however, the Department will take into account the post-merger concentration of the market, the size of the resulting increase in concentration, and the presence or absence of the other factors discussed in Sections III(B) and III(C).

c) Post-Merger HHI Above 1800. Markets in this region generally are considered to be highly concentrated, having the equivalent of no more than approximately six equally sized firms. Additional concentration resulting from mergers is a matter of significant competitive concern, and the Department will resolve close questions in favor of challenging the merger. The Department is unlikely, however, to challenge

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31/ Mergers producing increases in concentration close to the 100 point threshold include those between firms with market shares of 25 percent and 2 percent, 16 percent and 3 percent, 12 percent and 4 percent, 10 percent and 5 percent, 8 percent and 6 percent, and 7 percent and 7 percent.

mergers producing an increase in the HHI of less than 50 points. 32/ For mergers producing an increase in the HHI of from 50 to 100 points, the Department will base its decision whether to challenge the merger on the post-merger concentration of the market, the size of the resulting increase in concentration, and the presence or absence of the factors discussed in Sections III(B) and III(C). The Department is likely to challenge mergers in this region that produce an increase in the HHI of 100 points or more. 33/

2. Leading Firm Proviso. In some cases, typically where one of the merging firms is small, mergers that may create or enhance the market power of a single dominant firm could pass scrutiny under the standards stated in Section III(A)(1). Notwithstanding those standards, the Department is likely to challenge the merger of any firm with a market share of at least 1 percent with the leading firm in the market, provided that the leading firm has a market share that is at least 35 percent and is approximately twice as large as that of the second largest firm in the market. Because the ease and profitability of collusion are of little relevance to the ability of a single dominant firm to exercise market power, the Department will not consider the factors discussed in Section III(C) in this context. Under this standard, an ample market for small acquisitions typically will remain, and it is unlikely that any relevant economies will be limited to mergers involving the largest firm in the market.

32/ Mergers producing increases in concentration close to the 50 point threshold include those between firms with market shares of 12 percent and 2 percent, 8 percent and 3 percent, 6 percent and 4 percent, and 5 percent and 5 percent.

33/ There is some economic evidence that, where one or two firms dominate a market, the creation of a strong third firm enhances competition. The Department has considered this evidence but is not presently prepared to balance this possible gain against the certainty of substantially increased concentration in the market.

B. Ease of Entry.

If entry into a market is so easy that existing competitors could not succeed in raising price for any significant period of time, the Department is unlikely to challenge mergers in that market. Under the standards in Section II(B)(1), firms that do not presently sell the relevant product, but that could easily and economically sell it using existing facilities, are included in the market and are assigned a market share. This section considers the additional competitive effects of (1) production substitution where the necessary modifications are more substantial, and (2) entry through the construction of new facilities.

In assessing ease of entry to a market, the Department will consider the likelihood and probable magnitude of entry in response to a small but significant and non-transitory increase in price. 34/ As a first approximation, the Department will hypothesize a price increase of five percent and ask how much new entry would be likely to occur within two years. 35/ In most cases in which significant entry is unlikely, the Department will not attempt to differentiate further the degrees of difficulty of entry. In cases where entry is unusually difficult, however, the Department is more likely to challenge a merger.

34/ See note 10, above. In general, entry is more likely when the additional assets necessary to produce the relevant product are short-lived or widely used outside the particular market. Conversely, entry is less likely when those assets are long-lived and highly specialized to the particular application. Entry is generally facilitated by the growth of the market and hindered by its stagnation or decline. Entry also is hindered by the need for scarce special skills or resources and the need to achieve a substantial market share in order to realize important economies of scale. See also Section IV(B)(1)(b), below.

35/ Although this type of supply response will take longer to materialize than those previously considered, its prospect may have a greater deterrent effect on the exercise of market power by present sellers. Where new entry involves the dedication of long-lived assets to a market, the resulting capacity and its adverse effects on profitability will be present in the market until those assets are depreciated.

C. Other Factors

A variety of factors other than concentration, market shares, and ease of entry affect the likelihood that a merger will create, enhance or facilitate the exercise of market power. In evaluating mergers, the Department will consider the following factors as they relate to the ease and profitability of collusion. Where relevant, the factors are most likely to be important where the Department's decision whether to challenge a merger is otherwise close.

1. Nature of the Product and Terms of Sale.

(a) Homogeneity-Heterogeneity of the Relevant Product Generally. In a market with a homogeneous and undifferentiated product, a cartel need establish only a single price--a circumstance that facilitates reaching consensus and detecting deviation. As the products which constitute the relevant product become more numerous, heterogeneous, or differentiated, however, the problems facing a cartel become more complex. Instead of a single price, it may be necessary to establish and enforce a complex schedule of prices corresponding to gradations in actual or perceived quality attributes among the competing products. 36/

Product variation is arguably relevant in all cases, but practical considerations dictate a more limited use of the factor. There is neither an objective index of product variation nor an empirical basis for its use in drawing fine distinctions among cases. As a result, this factor will be taken into account only in relatively extreme cases where both identification and effect are more certain. For example, when the relevant product is completely homogeneous and undifferentiated, the Department is more likely to challenge the merger. Conversely, when the relevant product is very heterogeneous or sold subject to complex configuration options or customized production, the Department is less likely to challenge the merger. 37/ Over a significant

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36/ A similar situation may exist where there is rapid technological change or where supply arrangements consist of many complicated terms in addition to price.

37/ This conclusion would not apply, however, where the significance of heterogeneity is substantially reduced through detailed specifications that are provided by the buyer and that form the basis for all firms' bids.

middle range of the spectrum of product variation, this factor is less likely to affect the Department's analysis.

b) Degree of Difference Between the Products and Locations in the Market and the Next-Best-Substitutes. The market definition standards stated in Section II require drawing relatively bright lines in order to determine the products and sellers to be considered in evaluating a merger. For example, in defining the relevant product, all "good substitutes" in demand are included. The profitability of any collusion that might occur will depend in part, however, on the quality of the next-best substitute. That is, it matters whether the next-best substitute is only slightly or significantly inferior to the last product included in the relevant product. Similarly, it matters whether the next-most-distant seller is only slightly or significantly farther away than the last seller included in the geographic market. The larger the "gap" at the edge of the product and geographic markets, the more likely the Department is to challenge the merger.

c) Similarities and Differences in the Products and Locations of the Merging Firms. There also may be relevant comparisons among the products or sellers included in the market. Where products in a relevant market are differentiated or sellers are spatially dispersed, individual sellers usually compete more directly with some rivals than with others. In markets with highly differentiated products, the Department will consider the extent to which consumers perceive the products of the merging firms to be relatively better or worse substitutes for one another than for other products in the market. In markets with spatially dispersed sellers and significant transportation costs, the Department will consider the relative proximity of the merging firms. If the products or plants of the merging firms are particularly good substitutes for one another, the Department is more likely to challenge the merger.

2. Information About Specific Transactions and Buyer Market Characteristics. Collusive agreements are more likely to persist if participating firms can quickly detect and retaliate against deviations from the agreed prices or other conditions. Such deviations are easiest to detect, and therefore least likely to occur, in markets where detailed information about specific transactions or individual price or output levels is readily available to competitors. The Department is more likely to challenge a merger if such detailed information is available to competitors, whether the information comes from an exchange among sellers, public disclosure by buyers, reporting by the press or a government agency, or some other source.

Certain buyer market characteristics also may facilitate detection of deviation from collusive agreements. If orders for the relevant product are frequent, regular and small relative to the total output of a typical firm in the market, collusion is more likely to succeed because the benefits of departing from the collusive agreement in any single transaction are likely to be small relative to the potential costs. In order to increase its sales significantly in such circumstances, a seller would have to depart from the collusive agreement on a large number of orders. Each such sale takes customers away from other parties to the agreement, a fact that is particularly evident when demand is stable or declining. As a result, the chances of detection and effective response by other sellers increase with the number of such sales. The Department is more likely to challenge a merger where such buyer market characteristics exist.

3. Conduct of Firms in the Market. The Department is more likely to challenge a merger in the following circumstances:

a) Firms in the market previously have been found to have engaged in horizontal collusion regarding price, territories, or customers, and the characteristics of the market have not changed appreciably since the most recent finding. The additional concentration resulting from the merger could make explicit collusion more difficult to detect or tacit collusion more feasible.

b) One or more of the following types of practices are adopted by substantially all of the firms in the market: i) mandatory delivered pricing; ii) exchange of price or output information in a form that could assist firms in setting or enforcing an agreed price; iii) collective standardization of product variables on which the firms could compete; and iv) price protection clauses. Although not objectionable under all circumstances, these types of practices tend to make collusion easier, and their widespread adoption by the firms in the market raises some concern that collusion may already exist.

c) The firm to be acquired has been an unusually disruptive and competitive influence in the market. Before invoking this factor, the Department will determine whether the market is one in which performance might plausibly deteriorate because of the elimination of one disruptive firm.

4. Market Performance. When the market in which the proposed merger would occur is currently performing noncompetitively, the Department is more likely to challenge the merger. Non-competitive performance suggests that the firms in the market already have succeeded in overcoming, at least to some extent, the obstacles to effective collusion. Additional concentration of such a market through merger could further facilitate the collusion that already exists. When the market in which the proposed merger would occur is currently performing competitively, however, the Department will apply its ordinary standards of review. The fact that the market is currently competitive casts little light on the likely effect of the merger.

In evaluating the performance of a market, the Department will consider any relevant evidence, but will give particular weight to the following evidence of possible non-competitive performance when the factors are found in conjunction:

a) Stable relative market shares of the leading firms in recent years;

b) Declining combined market share of the leading firms in recent years; 38/ and

c) Profitability of the leading firms over substantial periods of time that significantly exceeds that of firms in industries comparable in capital intensity and risk.

IV. HORIZONTAL EFFECT FROM NON-HORIZONTAL MERGERS

By definition, non-horizontal mergers involve firms that do not operate in the same market. It necessarily follows that such mergers produce no immediate change in the level of concentration in any relevant market as defined in Section II. Although non-horizontal mergers are less likely than horizontal mergers to create competitive problems, they are not invariably innocuous. This Section describes the principal theories under which the Department is likely to challenge non-horizontal mergers.

38/ The exercise of market power often results in a gradual loss of market share. Fringe firms find it possible and profitable to expand their sales, and new entry may occur.

A. Elimination of Specific Potential Entrants

1. The Theory of Potential Competition. In some circumstances, the non-horizontal merger 39/ of a firm already in a market (the "acquired firm") with a potential entrant to that market (the "acquiring firm") 40/ may adversely affect competition in the market. If the merger effectively removes the acquiring firm from the edge of the market, it could have either of the following effects:

a) Harm to "Perceived Potential Competition". By eliminating a significant present competitive threat that constrains the behavior of the firms already in the market, the merger could result in an immediate deterioration in market performance. The economic theory of limit pricing suggests that monopolists and groups of colluding firms may find it profitable to restrain their pricing in order to deter new entry that is likely to push prices even lower by adding capacity to the market. If the acquiring firm had unique advantages in entering the market, the firms in the market might be able to set a new and higher price after the threat of entry by the acquiring firm was eliminated by the merger.

b) Harm to "Actual Potential Competition". By eliminating the possibility of entry by the acquiring firm in a more pro-competitive manner, the merger could result in a lost opportunity for improvement in market performance resulting from the addition of a significant competitor. The more pro-competitive alternatives include both new entry and entry through a "toehold" acquisition of a present small competitor.

2. Relation Between Perceived and Actual Potential Competition. If it were always profit-maximizing for incumbent firms to set price in such a way that all entry was deterred and if information and coordination were sufficient to implement this

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39/ Under traditional usage, such a merger could be characterized as either "vertical" or "conglomerate," but the label adds nothing to the analysis.

40/ The terms "acquired" and "acquiring" refer to the relationship of the firms to the market of interest, not to the way the particular transaction is formally structured.

strategy, harm to perceived potential competition would be the only competitive problem to address. In practice, however, actual potential competition has independent importance. Firms already in the market may not find it optimal to set price low enough to deter all entry; moreover, those firms may misjudge the entry advantages of a particular firm and, therefore, the price necessary to deter its entry. 41/

3. Enforcement Standards. Because of the close relationship between perceived potential competition and actual potential competition, the Department will evaluate mergers that raise either type of potential competition concern under a single structural analysis analogous to that applied to horizontal mergers. The Department first will consider a set of objective factors designed to identify cases in which harmful effects are plausible. In such cases, the Department then will conduct a more focused inquiry to determine whether the likelihood and magnitude of the possible harm justify a challenge to the merger. In this context, the Department will consider any specific evidence presented by the merging parties to show that the inferences of competitive harm drawn from the objective factors are unreliable.

The factors that the Department will consider are as follows:

a) Market Concentration. Barriers to entry are unlikely to affect market performance if the structure of the market is otherwise not conducive to monopolization or collusion. Adverse competitive effects are likely only if overall concentration, or the largest firm's market share, is high. The Department is unlikely to challenge a potential competition merger unless overall concentration of the acquired firm's market is above 1800 HHI (a somewhat lower concentration will suffice if one or more of the factors discussed in Section III(C) indicate that effective collusion in the market is particularly likely). Other things being equal, the Department is increasingly likely to challenge a merger as this threshold is exceeded.

41/ When collusion is only tacit, the problem of arriving at and enforcing the correct limit price is likely to be particularly difficult.

b) Conditions of Entry Generally. If entry to the market is generally easy, the fact that entry is marginally easier for one or more firms is unlikely to affect the behavior of the firms in the market. The Department is unlikely to challenge a potential competition merger when new entry into the acquired firm's market can be accomplished by firms without any specific entry advantages under the conditions stated in Section III(B). Other things being equal, the Department is increasingly likely to challenge a merger as the difficulty of entry increases above that threshold.

c) The Acquiring Firm's Entry Advantage. If more than a few firms have the same or a comparable advantage in entering the acquired firm's market, the elimination of one firm is unlikely to have any adverse competitive effect. The other similarly situated firm(s) would continue to exert a present restraining influence, or, if entry would be profitable, would recognize the opportunity and enter. The Department is unlikely to challenge a potential competition merger if the entry advantage ascribed to the acquiring firm (or another advantage of comparable importance) is also possessed by three or more other firms. Other things being equal, the Department is increasingly likely to challenge a merger as the number of other similarly situated firms decreases below three and as the extent of the entry advantage over non-advantaged firms increases.

If the evidence of likely actual entry by the acquiring firm is particularly strong, 42/ however, the Department may challenge a potential competition merger, notwithstanding the presence of three or more firms that are objectively similarly situated. In such cases, the Department will determine the likely scale of entry, using either the firm's own documents or the minimum efficient scale in the industry. The Department will then evaluate the merger much as it would a horizontal merger between a firm the size of the likely scale of entry and the acquired firm.

42/ For example, the firm already may have moved beyond the stage of consideration and have made significant investments demonstrating an actual decision to enter.

d) The Market Share of the Acquired Firm. Entry throughthe acquisition of a relatively small firm in the market may have a competitive effect comparable to new entry. Small firms frequently play peripheral roles in collusive interactions, and the particular advantages of the acquiring firm may convert a fringe firm into a significant factor in the market. 43/ The Department is unlikely to challenge a potential competition merger when the acquired firm has a market share of five percent or less. Other things being equal, the Department is increasingly likely to challenge a merger as the market share of the acquired firm increases above that threshold. The Department is likely to challenge any merger satisfying the other conditions in which the acquired firm has a market share of 20 percent or more.

B. Competitive Problems from Vertical Mergers

1. Barriers to Entry from Vertical Mergers

In certain circumstances, the vertical integration resulting from vertical mergers could create competitively objectionable barriers to entry. Stated generally, three conditions are necessary (but not sufficient) for this problem to exist. First, the degree of vertical integration between the two markets must be so extensive that entrants to one market (the "primary market") also would have to enter the other market (the "secondary market") 44/ simultaneously. Second, the requirement of entry at the secondary level must make entry at the primary level significantly more difficult and less likely to occur. Finally, the structure and other characteristics of the primary market must be otherwise so conducive to non-competitive performance that the increased difficulty of entry is likely to affect its performance. The following standards state the criteria by which the Department will determine whether these conditions are satisfied.

43/ Although a similar effect is possible with the acquisition of larger firms, there is an increased danger that the acquiring firm will choose to acquiesce in monopolization or collusion because of the enhanced profits that would result from its own disappearance from the edge of the market.

44/ This competitive problem could result from either upstream or downstream integration, and could affect competition in either the upstream market or the downstream market. In the text, the term "primary market" refers to the market in which the competitive concerns are being considered, and the term "secondary market" refers to the adjacent market.

a. Need for Two-Level Entry. If there is sufficient unintegrated capacity 45/ in the secondary market, new entrants to the primary market would not have to enter both markets simultaneously. The Department is unlikely to challenge a merger on this ground where post-merger sales (purchases) by unintegrated firms in the secondary market would be sufficient to service two minimum-efficient-scale plants in the primary market. When the other conditions are satisfied, the Department is increasingly likely to challenge a merger as the unintegrated capacity declines below this level.

b. Increased Difficulty of Simultaneous Entry to Both Markets. The relevant question is whether the need for simultaneous entry to the secondary market gives rise to a substantial incremental difficulty as compared to entry into the primary market alone. If entry at the secondary level is easy in absolute terms, the requirement of simultaneous entry to that market is unlikely adversely to affect entry to the primary market. Whatever the difficulties of entry into the primary market may be, the Department is unlikely to challenge a merger on this ground if new entry into the secondary market can be accomplished under the conditions stated in Section III(B). 46/ When entry is not possible under those conditions, the Department is increasingly concerned about vertical mergers as the difficulty of entering the secondary market increases.

45/ Ownership integration does not necessarily mandate two-level entry by new entrants to the primary market. Such entry is most likely to be necessary where the primary and secondary markets are completely integrated by ownership and each firm in the primary market uses all of the capacity of its associated firm in the secondary market. In many cases of ownership integration, however, the functional fit between vertically integrated firms is not perfect, and an outside market exists for the sales (purchases) of the firms in the secondary market. If that market is sufficiently large and diverse, new entrants to the primary market may be able to participate without simultaneous entry to the secondary market. In considering the adequacy of this alternative, the Department will consider the likelihood of predatory price or supply "squèezes" by the integrated firms against their unintegrated rivals.

46/ Entry into the secondary market may be greatly facilitated in that an assured supplier (customer) is provided by the primary market entry.

The Department, however, will invoke this theory only where the need for secondary market entry significantly increases the costs (which may take the form of risks) of primary market entry.

i) Increased Cost of Capital as a Barrier to Entry. More capital is necessary to enter two markets than to enter one. Standing alone, however, this additional capital requirement does not constitute a barrier to entry to the primary market. If the necessary funds were available at a cost commensurate with the level of risk in the secondary market, there would be no adverse effect. In some cases, however, lenders may doubt that would-be entrants to the market have the necessary skills and knowledge to succeed in the secondary market and, therefore, in the primary market. In order to compensate for this risk of failure, lenders might charge a higher rate for the necessary capital. This problem becomes increasingly significant as a higher percentage of the capital assets in the secondary market are long-lived and specialized to that market and, therefore, difficult to recover in the event of failure. In evaluating the likelihood of increased barriers to entry resulting from increased cost of capital, therefore, the Department will consider both the degree of similarity in the essential skills in the primary and secondary markets and the degree of specialization of the capital assets in the secondary market.

ii) Economies of Scale as a Barrier to Entry. Economies of scale in the secondary market may constitute an additional barrier to entry to the primary market in some situations requiring two-level entry. The problem could arise if the capacities of minimum-efficient-scale plants in the primary and secondary markets differ significantly. For example, if the capacity of a minimum-efficient-scale plant in the secondary market were significantly greater than the needs of a minimum-efficient-scale plant in the primary market, entrants would have to choose between inefficient operation at the secondary level (because of operating an efficient plant at an inefficient output or because of operating an inefficiently small plant) or a larger than necessary scale at the primary level. Either of these effects could cause a significant increase in the operating costs of the entering firm. 47/

47/ It is important to note, however, that this problem would not exist if a significant outside market exists at the secondary level. In that case, entrants could enter with the appropriately scaled plants at both levels, and sell or buy in the market as necessary.

c. Structure and Performance of the Primary Market. Barriers to entry are unlikely to affect performance if the structure of the primary market is otherwise not conducive to monopolization or collusion. 48/ The Department is unlikely to challenge a merger on this ground unless overall concentration of the primary market is above 1800 HHI (a somewhat lower concentration will suffice if one or more of the factors discussed in Section III(C) indicate that effective collusion is particularly likely). Above that threshold, the Department is increasingly likely to challenge a merger that meets the other criteria set forth above as the concentration increases. 49/

2. Facilitating Collusion Through Vertical Mergers.

a. Vertical Integration to the Retail Level. A high level of vertical integration by upstream firms into the associated retail market may facilitate collusion in the upstream market by making it easier to monitor price. Retail prices are generally more visible than prices in upstream markets, and vertical mergers may increase the level of vertical integration to the point at which the monitoring effect becomes significant. Adverse competitive consequences are unlikely unless the upstream market is generally conducive to collusion and a large percentage of the products produced there are sold through vertically integrated retail outlets.

The Department is unlikely to challenge a merger on this ground unless i) overall concentration of the upstream market is above 1800 HHI (a somewhat lower concentration will suffice if one or more of the factors discussed in Section III(C) above

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48/ For example, a market with 100 firms of equal size would perform competitively despite a significant increase in entry barriers.

49/ Even if all the conditions above are satisfied, the Department may not challenge a particular merger. The likelihood of significant competitive harm is lower than it is for horizontal mergers identified as competitively objectionable under the standards in Section III, and the extensive pattern of use integration, which is a necessary condition to the competitive problem under discussion, may constitute evidence that substantial economies are afforded by vertical integration. When such economies are present, it might be economically perverse and inequitable to the remaining independent firms to deny them the ability to integrate through merger.

indicate that effective collusion is particularly likely), and ii) a large percentage of the upstream product would be sold through vertically-integrated retail outlets after the merger. Where the stated thresholds are met or exceeded, the Department's decision whether to challenge a merger on this ground will depend upon an individual evaluation of its likely competitive effect. 50/

b. Elimination of a Disruptive Buyer. The elimination by vertical merger of a particularly disruptive buyer in a downstream market may facilitate collusion in the upstream market. If upstream firms view sales to a particular buyer as sufficiently important, they may deviate from the terms of a collusive agreement in an effort to secure that business, thereby disrupting the operation of the agreement. The merger of such a buyer with an upstream firm may eliminate that rivalry, making it easier for the upstream firms to collude effectively. Adverse competitive consequences are unlikely unless the upstream market is generally conducive to collusion and the disruptive firm is significantly more attractive to sellers than the other firms in its market.

The Department is unlikely to challenge a merger on this ground unless i) overall concentration of the upstream market is 1800 HHI or above (a somewhat lower concentration will suffice if one or more of the factors discussed in III(C) above indicate that effective collusion is particularly likely), and ii) the allegedly disruptive firm differs substantially in volume of purchases or other relevant characteristics from the other firms in its market. Where the stated thresholds are met or exceeded, the Department's decision whether to challenge a merger on this ground will depend upon an individual evaluation of its likely competitive effect.

3. Evasion of Rate Regulation

Non-horizontal mergers may be used by monopoly public utilities subject to rate regulation as a tool for circumventing that regulation. The clearest example is the acquisition by a regulated utility of a supplier of its fixed or variable inputs. After the merger, the utility would be selling to itself and might be able arbitrarily to inflate the prices of internal transactions. Regulators may have great difficulty in policing these practices, particularly if there is no independent market

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50/ See note 49, above.

for the product (or service) purchased from the affiliate. 51/ As a result, inflated prices could be passed along to consumers as "legitimate" costs. In extreme cases, the regulated firm may effectively preempt the adjacent market, perhaps for the purpose of suppressing observable market transactions, and may distort resource allocation in that adjacent market as well as in the regulated market. In such cases, however, the Department recognizes that genuine economies of integration may be involved. The Department will consider challenging mergers that create substantial opportunities for such abuses. 52/

V. DEFENSES

A. Efficiencies

In the overwhelming majority of cases, the Guidelines will allow firms to achieve available efficiencies through mergers without interference from the Department. Except in extraordinary cases, the Department will not consider a claim of specific efficiencies as a mitigating factor for a merger that would otherwise be challenged. 53/ Plausible efficiencies are far

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51/ A less severe, but nevertheless serious, problem can arise when a regulated utility acquires a firm that is not vertically related. The use of common facilities and managers may create an insoluble cost allocation problem and provide the opportunity to charge utility customers for non-utility costs, consequently distorting resource allocation in the adjacent as well as the regulated market.

52/ Where a regulatory agency has the responsibility for approving such mergers, the Department will express its concerns to that agency in its role as competition advocate.

53/ At a minimum, the Department will require clear and convincing evidence that the merger will produce substantial cost savings resulting from the realization of scale economies, integration of production facilities, or multi-plant operations which are already enjoyed by one or more firms in the industry and that equivalent results could not be achieved within a comparable period of time through internal expansion or through a merger that threatened less competitive harm. In any event, the Department will consider such efficiencies only in resolving otherwise close cases.

easier to allege than to prove. Moreover, even if the existence of efficiencies were clear, their magnitudes would be extremely difficult to determine.

B. Failing Firm

The "failing firm defense" is a long-established, but ambiguous, 54/ doctrine under which an anticompetitive merger may be allowed because one of the merging firms is "failing." Because the defense can immunize significantly anticompetitive mergers, the Department will construe its elements strictly.

The Department is unlikely to challenge an anticompetitive merger in which one of the merging firms is allegedly failing when: 1) the allegedly failing firm probably would be unable to meet its financial obligations in the near future, and 2) it probably would not be able to reorganize successfully under Chapter 11 of the Bankruptcy Act, 55/ and 3) it has made unsuccessful good faith efforts to elicit reasonable alternative offers of acquisition of the failing firm 56/ that would both keep it in the market and pose a less severe danger to competition than does the proposed merger. Although these

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54/ Although its original basis is open to question, the defense is sometimes explained as a balancing of competitive and non-competitive concerns. Under that view, when the elements of the defense are satisfied, there is a conclusive presumption that the anticompetitive dangers associated with the merger are outweighed by the income losses to creditors, stockholders, and communities associated with the failure of the firm. As a general matter, the Department views the incorporation of non-competitive concerns into antitrust analysis as inconsistent with the mandate contained in the antitrust laws. To the extent that the financial health of the firm is relevant to the competitive analysis, the Department, of course, will consider it in that context.

55/ 11 U.S.C.A. §§ 1101 *et seq*. (1979).

56/ The fact that an offer is less than the proposed transaction does not make it unreasonable.

standards are more difficult to apply when the allegedly failing firm is an unincorporated part of a larger parent firm, the Department will recognize the defense in appropriate cases of that type. 57/

57/ The Department is unlikely to challenge an otherwise anticompetitive merger in which one of the merging firms is a financially healthy subdivision of an allegedly failing parent firm when: 1) the parent firm satisfies the above conditions, and 2) the competitive harm from the disappearance of the parent firm from its market would substantially outweigh the competitive harm threatened by the merger, 3) the proposed transaction probably would enable the parent firm to avoid bankruptcy or to reorganize successfully, 4) the third condition stated in the text also has been satisfied with respect to the healthy subdivision, and 5) the merging firm is not capable of independent existence as a business entity. Where the merging firm is capable of independent existence, the Division may insist that the parent company attempt to transfer common stock in it to the parent company's creditors.

B. Guidelines for Sentencing Recommendations in Felony Cases Under the Sherman Act

This memorandum is intended to state the policies that the Antitrust Division will use in making sentencing recommendations for persons convicted of felonies established by the Antitrust Procedures and Penalties Act of 1974. It embodies the Division's commitment to increased criminal sentences and to evenhandedness in law enforcement.

Introduction

A primary purpose of these Guidelines is to provide a means by which sentencing recommendations will be more rational and equitable. Sentencing in past antitrust cases, as with past sentencing in white collar crimes in general, can be criticized on two bases: it has been ineffective in that it has been lenient, and it has been inequitable as evidenced by disparate sentences. Congress, by increasing the maximum penalties in the Sherman Act, has given the courts a mandate for heavier sentences. In the Antitrust Procedures and Penalties Act, Congress increased the maximum penalties under the Sherman Act to a three-year maximum jail term and $100,000 maximum fine for individuals and a $1 million fine for corporations. 1/ These Guidelines are designed to serve as a tool to enable our attorneys to make reasoned and consistent sentencing recommendations and to explain to the courts and the public what we are doing.

The issue of equity is a necessary first step in achieving justice that is fair and proper as well as evenhanded in application. The Judiciary has been increasingly concerned about the sentencing process, especially the lack of guidance and review. 2/ Without explicit policy to structure and guide

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1/ Under prior law, the maximum sentence was one year imprisonment and a $50,000 fine for individuals, and a $50,000 fine for corporations.

2/ For example, Chief Justice Burger addressed the subject in his 1977 State of the Judiciary message. The Judicial Conference Committee on Rules of Procedure is presently holding hearings on the subject. Senator Kennedy has recently introduced legislation (S. 181) in the Senate which would, *inter alia*, establish sentencing criteria and a sentencing commission to promulgate sentencing guidelines. 123 Cong. Rec. S405 (Jan. 11, 1977).

discretion, decisionmakers, whether trial attorneys, top staff, or judges, tend to function as rugged individualists, and consistency is lost. These Guidelines are designed to improve our contribution to the sentencing process--to structure our sentencing recommendation discretion without removing it. They provide an articulated foundation for an equitable sentencing policy, while retaining the potential for individual variation justified by the facts of a particular case. At a minimum these Guidelines help articulate the factors used--the amount of commerce involved, the duration of the conspiracy, the coercive or predatory nature of the conduct involved, the level of authority--and the weights given to them in calculating a sentence which both fits the crime and the defendant, and furthers our antitrust enforcement goals.

Undoubtedly, some will feel that the factors we have chosen are inappropriate or over- or under-inclusive. However, they are factors that have been selected after a great deal of thought and work by many experienced antitrust attorneys. Experience will show us whether and how our Guidelines need revision. If we can make what we are presently doing explicit and, thus, more consistent, we shall be better prepared to argue the merits of the factors, after we have had some experience with them.

The obvious question is what is our justification for recommending prison sentences for convicted antitrust felons. One justification is that Congress recently increased not only the maximum fine but also the maximum prison penalty for Sherman Act violations, indicating a judgment that imprisonment should play an important role in punishing antitrust crime. In the last several years, the amount of price fixing that has been uncovered continues to increase, despite the threat of single damage actions on behalf of the United States, treble damage actions by private plaintiffs and criminal fines.

A second reason is that prison sentences are uniquely effective in deterring antitrust violators (who are generally white collar businessmen) who may view a fine as a "license fee" for fixing prices 3/ but who view the threat of a substantial

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3/ Businessmen have been quoted as admitting that they view a fine or light criminal sentence as a small price to pay for the chance to increase profits substantially as the result of a price-fixing conspiracy. Business Week, p. 48, June 2, 1975.

prison term more seriously. This applies not only to deterring a convicted antitrust criminal from repeated violations (specific deterrence), but also to deterring others who may be tempted to engage in price fixing (general deterrence). Antitrust crimes, like other "white collar" crimes, have characteristics that warrant the belief they will be deterred by the threat of substantial penalties. An antitrust violation is not a crime of passion, nor is it normally committed out of need, desperation or stupidity. It is more likely to be carried out over a period of several months or years, with at least a minimum degree of coordination and planning rather than a single impulsive act. In sum, an antitrust crime is carried out by one who has a clear option to engage or not to engage in criminal activity and as such the imposition of substantial sentences can have a major effect in deterring such criminal conduct. It bears emphasizing here that the Sherman Act does not require proof of specific intent (scienter) but rather presumes that individuals are responsible for the reasonable and necessary consequences of their acts and so intend them.

The importance of deterrence as a basis for sentencing those who violate the antitrust laws is similar to the importance of deterrence as a basis for sentencing those convicted of tax violations. The functioning of our economy, as with the functioning of our tax system, depends largely upon voluntary compliance. The Antitrust Division can no more monitor the competitive behavior of every firm and industry than the IRS and Tax Division can enforce the tax laws by monitoring every citizen. Instead it is the practice of the Tax Division to always recommend prison sentences in criminal cases, thereby hoping to deter the millions of other taxpayers from attempting to evade taxes. Given the impossibility of monitoring all the businesses in the country, and the difficulty of detecting and proving criminal violations of the antitrust laws, the sentencing opportunities of each antitrust case must be used to the maximum advantage in deterring other violations.

The Guidelines reinforce our deterrence efforts by making clear the kinds of sentences we shall recommend for antitrust violators. By explicitly identifying the factors important to our sentencing recommendations, we put the businessman on notice of the kind of conduct that we view as clearly falling outside the law and within serious criminal sanctions.

There are several reasons why we believe it important to submit sentencing recommendations. First, antitrust sentences should be broadly consistent over time and across the country in order to achieve our national enforcement goal of general deterrence. Our recommendations will indicate to the judge (who may never have sentenced an antitrust felon before) the type of sentences we have sought elsewhere. Uneven sentencing would cause society to perceive the sentencing decision as the product of chance or unexplained decision processes, and would weaken public trust in the rule of law and the enforcement process. Secondly, as the agency charged with enforcing the antitrust laws, we have expertise on the relative degree of seriousness of different fact situations, and can assist the judge in understanding why one defendant's conduct merits more or less punishment in accordance with the enforcement objectives of the Sherman Act. We also have unique access to information relevant to how well our goal of general deterrence is being achieved, as indicated by the number of pending grand jury and CID investigations. Sentencing disparities are not due to design on the part of judges but rather to their lack of familiarity with the whole picture, with the relation of this case to other cases and overall enforcement. As such, these Guidelines and our recommendations will provide the judges with tools that will assist them in the exercise of their discretion in an efficient and rational manner. Thirdly, the degree of cooperation with the government, an important mitigating factor, is something peculiarly within our knowledge. Finally, the Federal Rules of Criminal Procedure authorize us to address the court on sentencing. Rule 32 states that "[t]he attorney for the government shall have an equivalent opportunity to speak to the court" as is afforded the defendant and counsel for the defendant. F. R. Crim. P. 32(a)(1).

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This memorandum is divided into three sections:

I. Recommended Prison Terms for Individuals;

II. Recommended Fines for Individuals; and

III. Recommended Fines for Corporations.

I. RECOMMENDED PRISON TERMS FOR INDIVIDUALS

This is in many ways the most difficult area of sentencing, because individual sentencing involves judgments as to the behavior of individual human beings, and imprisonment deprives people of cherished personal freedom. For that reason it is important that our sentencing recommendations be rational and uniform, and provide just punishment for the offense. At the same time, the sentence must reflect the seriousness of the offense in terms of the larger law enforcement needs of the Department of Justice and the Antitrust Division. The factors set forth below should provide a framework that will insure sentence recommendations that meet these requirements.

As discussed above, the primary reasons the Division will recommend imprisonment of antitrust criminals are general and specific deterrence--to deter all prospective violators from violating the Sherman Act and to deter a particular defendant from repeating the violation.

A. The Impact of Parole

In calculating the prison term which best serves these goals, we must take into account the parole provisions of Title 18 of the United States Code. As discussed below, those provisions provide for parole after a portion of the sentence has been served, assuming the prisoner satisfies certain parole criteria. 4/ We can assume that our white collar price fixers will generally satisfy these criteria, for they probably, for example, will have observed prison rules, will not be drug addicts, and will pose no jeopardy to the public welfare. Thus, the major consideration relevant to a parole determination for an antitrust prisoner is whether release

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4/ See 18 U.S.C. § 4206; 18 C.F.R. § 2.20 (41 Fed. Reg. 37316-37324, Sept. 3, 1976).

would "depreciate the seriousness of his offense or promote disrespect for the law . . .". 5/ This determination can and should be made by the court at the time of sentencing, rather than after the defendant has served some time under a somewhat open-ended sentence.

Federal law basically provides that prisoners sentenced to a definite term of more than one year shall be eligible for parole after serving one-third of the term, with additional time off for good behavior. 6/ We believe this provision should be applied uniformly by the courts in antitrust cases, so that antitrust prisoners will not be eligible for parole before they have served one-third of the sentence imposed minus good time. 7/ Obviously standard parole treatment is a necessary part of uniform antitrust sentencing.

The important thing to remember about the parole provisions is that they substantially reduce the amount of time served 8/ and on occasion produce unintended consequences in terms of actual time served. A defendant sentenced to less than six months is not eligible for parole, and may serve more time than a defendant sentenced for a longer period but released on parole. These computations are something which should be made before recommending a sentence.

5/ *Id.*

6/ 18 U.S.C. §§ 4161, 4162 and 4205. Maximum "good time" allowances under these provisions can total eight days per month for sentences between six months and one year, and 11 days per month for sentences between one and three years.

7/ 18 U.S.C. § 4205 essentially provides that the sentencing court may provide for the prisoner's release "as if on parole" after serving one-third of a sentence of six months to one year, and does not provide for parole in cases where the sentence is less than six months. Additionally, the sentencing judge has the authority to prescribe a time period of less than one-third of the sentence after which the prisoner will become eligible for parole.

8/ For this reason, recommendations of early parole should be used to take into account mitigating circumstances which, though unrelated to the seriousness of the crime itself, are relevant to our enforcement efforts or the personal situation of the defendant. See discussion *infra* at 12-15.

In the discussion that follows, we shall assume that the sentence imposed implicitly or explicitly provides that the prisoner will be eligible for parole after serving one-third of the sentence (less good time), unless the sentence imposed is less than six months.

B. The 18-month Base Sentence

The maximum prison term for a Sherman Act felony is three years, and the corresponding parole eligibility would occur after one year. The Division will, in appropriate circumstances, recommend this maximum penalty. In arriving at individual recommendations, we shall follow a step-by-step approach considering and applying several aggravating and mitigating factors to a base sentence of 18 months. 9/ The 18 months will be the base period from which to calculate our recommendations in all criminal antitrust cases except those which involve very small, purely local conspiracies.

The 18-month base was selected as the figure which we at present perceive to best advance the enforcement needs of the Sherman Act. It may be altered in light of what experience shows us is its actual deterrent effect. As the midpoint of the sentencing range legislated by Congress, it meets the congressional concern that antitrust sentences be increased, yet leaves flexibility to increase or decrease the recommended sentence in accordance with the aggravating or mitigating factors present in a particular case. It is long enough, we hope, to deter the average individual from participating in a proffered price-fixing conspiracy. It is also long enough to bring antitrust sentences more or less in line with sentences for other white collar felonies. 10/

9/ As explained above we assume that under such a sentence of 18 months, an individual would be eligible for parole after less than six months.

10/ In fiscal 1976, those convicted of securities fraud were sentenced to an average of 45.4 months imprisonment. Transportation of forged securities was punished by an average imprisonment of 45.4 months, and bank embezzlement by 22.6 months. Income tax fraud brought an average imprisonment of 15.4 months. Administrative Office of the United States Courts, 1976 Annual Report of the Director, App. II, Table D5.

Since sentencing deals with an infinite variety of human behavior, it is impossible to plan for all possible fact situations in advance. Instead, the Sentencing Guidelines identify the factors that should be taken into account in recommending a sentence that will be rationally related to the offense and will deter future violations. The aggravating factors listed below should be applicable to most fact situations. The weight to be assigned to each factor will depend upon the degree to which the factor was present in the particular violation. 11/ In addition, these Guidelines may well have to be adjusted over time to reflect their actual effectiveness in deterring price fixing.

Sentencing is not an exact science. Unfortunately, there is no way to calculate precisely what kind of punishment will most accurately satisfy those goals in the case of each individual defendant. Rather it is based upon broad judgments that a particular sentence (e.g. zero to three years) is the type of punishment necessary to punish and deter a particular crime (e.g. price fixing). 12/

Given that type of mandate and level of knowledge about sentencing, there is no assurance that fine-tuning a sentence to reflect every detail of a violation would provide any more effective punishment and deterrence than recommendations based upon the more flexible guideline approach outlined here.

C. Factors in Aggravation

Experience has shown that there are five factors that will almost always be relevant in determining the severity of the sentence necessary to deter antitrust violations:

(1) amount of commerce involved;
(2) position of the individual;
(3) existence and degree of predatory or coercive conduct;
(4) duration of participation; and
(5) previous conviction.

11/ We recognize that there may be special cases that will require individual treatment. The burden, however, will be on the person seeking deviation from the guidelines to justify such special treatment.

12/ *See*, *e.g.*, 119 Cong. Rec. H10761, H10763 (Nov. 19, 1973)(Noting that antitrust crimes need heavier punishment).

These factors should be considered in aggravation. Although no precise weight can be given to any of these factors, as a general proposition the recommended sentence should be adjusted upward from one to six months for each aggravating factor that is present.

1. Amount of Commerce Involved

The amount of commerce involved in a conspiracy is a rough measure of the potential impact it could have upon the economy. Inasmuch as the conspiracy is the aggregate result of the agreements of all its members, each member should be held responsible for the aggregate amount of commerce affected.

The base recommendation of 18 months already takes into account an "amount of commerce" factor commonly present in small or medium size conspiracies. Where the commerce affected by the conspiracy exceeds $50 million in any one year, this factor will result in an upward adjustment of the recommended sentence by one to six months. A major conspiracy, involving for example ten times that amount of commerce, would call for a six-month additional sentence on this ground. Where the amount of commerce is extremely small, as in the very smallest, local price-fixing conspiracy involving extremely small companies or "mom and pop" enterprises, the amount of commerce involved may be considered a mitigating factor for reasons discussed below. 13/

2. Position of the Individual

This element should only be considered as an aggravating factor. The 18-month base assumes a defendant is an "average" employee and a run-of-the-mill member of the conspiracy. Where the defendant serves in an executive position, e.g., sales manager, vice president, president, or chairman (or any other position where the individual is largely giving orders rather than largely following directions), the 18-month base sentence recommendation should be adjusted upward from one to six months, depending upon the position of the individual. This should also be done where the individual has been the obvious linchpin or leader of the conspiracy responsible for organizing it and holding it together. By making clear that those who have positions of responsibility should receive heavier prison sentences, we hope to deter them from getting themselves and their subordinates involved in price-fixing schemes.

13/ See discussion at p. II-131.

In considering this factor, it is important that we not slip into the practice of comparing the relative roles of activity or passivity of all the conspirators. Apart from leaders and high corporate officials, all co-conspirators should be treated equal to all others. An agreement is all that is necessary to constitute the offense, and the agreement of a passive conspirator is just as much an agreement as an agreement by a more active participant. An individual who has been indicted and convicted is sufficiently involved in the conspiracy to warrant a sentence which is strong enough to both punish him and deter him and others from similar conduct. The more marginal conspirator is perhaps the one most likely to be deterred by tougher sentences, and, if such conspirators are essential to a scheme, deterring them may be enough to prevent a conspiracy from ever being created.

3. Existence and Degree of Predatory or Coercive Conduct

By this element we mean the use of threats, force, or economic reprisals to further the conspiracy. To be sure, a well-run conspiracy probably does not need coercion to carry out its illegal objective, and accordingly the absence of coercion is in no way a mitigating factor. However, coercion is socially undesirable conduct, from which we want to deter others, and as such justifies increasing the sentence. The presence of coercion requires an upward adjustment of one to six months to the recommended sentence, depending on the character and scope of the relevant conduct, and the power of the party doing the coercion.

Coercion might arise in a number of contexts, the most obvious being coercive price fixing, e.g., where small competitors are threatened with retaliation if they do not increase prices. Predatory conduct should be scrutinized to ascertain to what extent it is being used to coerce competitors to join in a conspiracy or course of conduct.

4. Duration of Participation

While normally the brevity of one's participation in a short-term conspiracy should not be considered a mitigating factor, unusually lengthy participation is an appropriate factor to consider in aggravation. The fact that a defendant had participated in the conspiracy only briefly before our investigation or indictment brought it to a halt is irrelevant, for we have no way of knowing how long his participation would have continued had we not uncovered the crime. 14/

The 18-month base recommendation takes into account some minimum duration necessary to get the conspiracy operating. This will vary from conspiracy to conspiracy. In general, duration should be treated as an aggravating factor increasing our recommended sentence by one to six months where the defendant's participation has extended over a period of more than one year.

5. Previous Conviction

In most instances a prior antitrust conviction (including a *nolo contendere* plea) should result in the maximum recommendation regardless of other factors. A prior conviction for a similar state or federal crime should result in an upward adjustment of one to six months.

D. Factors in Mitigation

There are two mitigating factors that should be considered, if present, in virtually all cases: (1) cooperation with the government and (2) personal, family or business hardship. These factors will be considered after the recommended sentence has been determined and applied, to reduce the amount of time we recommend actually be served. For example, a recommended sentence of 18 months would typically mean parole after serving somewhat less than six months (one-third of the sentence less time off for good behavior) absent mitigating circumstances. Given mitigating circumstances, we would supplement our sentence recommendation with the further recommendation that parole be granted sooner than it otherwise would be.

The practice of using mitigating factors to reduce time served rather than the recommended sentence recognizes that the purposes served by imprisoning price fixers bear little or no relationship to the defendant's personal characteristics or feelings. We imprison those who fix prices largely to deter them and others from similar conduct. Deterrence requires that substantial sentences be consistently and predictably imposed upon illegal

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14/ In contrast, affirmative withdrawal from a continuing conspiracy may be considered in mitigation. See discussion at p. II-130.

conduct. The only mitigating factors relevant to antitrust violations--cooperation with the government and business, personal or financial responsibilities--relate not to the seriousness of the crime or the degree to which society wants to punish that crime and deter others from crimes like it, but to the appropriateness of imprisoning a particular defendant because of outside factors relevant to our enforcement goals.

1. Cooperation With the Government

Cooperation, even when delayed until after indictment, is extremely important and should be encouraged and rewarded as much as possible. It is important not only because it can save the government time and money and improve the chances of convicting the guilty, but also because cooperation, to the extent that it improves our enforcement ability, may increase the deterrent effect of our enforcement efforts. Rewarding cooperation will also, we hope, deter some potential conspirators from entering into a conspiracy when they realize that if caught, their co-conspirators have an incentive to tell the whole story. 15/ Where a defendant provides us with timely and full cooperation with respect to his case and, where we actually need and accept the cooperation, we should recommend that the time served be substantially reduced below that which would otherwise be served under our recommended sentence. However, we must actually need, receive, and accept the cooperation. Where cooperation is offered by a defendant but not accepted because it is unnecessary, significant mitigation is not justified. Such a policy should help encourage earlier cooperation, because each defendant will know that if he or she cooperates after several others, a reduced sentence is less likely.

There are obviously other factors which defendants undoubtedly will urge the court to consider in mitigation. Two that we have frequently encountered in the past are early withdrawal from the conspiracy and remorse. The former may be entitled to some consideration in mitigation; the latter is not.

15/ We are dealing here with post-indictment cooperation. Valuable preindictment cooperation generally results in immunity. In the event we were to indict someone who had given us substantial and important preindictment cooperation, that cooperation would likewise be a mitigating factor.

Early withdrawal from an ongoing conspiracy is conduct that we seek to encourage. However, withdrawing and keeping quiet about the conspiracy falls far short of withdrawing and then bringing the illegal activity to the government's attention. Withdrawal, absent cooperation with the government, is therefore entitled to very little mitigating weight. To some extent this factor has already been considered in connection with the "amount of commerce" and "duration" aggravating factors, for the briefer the defendant's participation, the smaller those factors will be.

Remorse has no more bearing upon our goal of general deterrence than defendant's churchgoing habits or charitable contributions. It should come as no surprise that a businessman who has been indicted and convicted of a felony should feel remorse. Furthermore, if he were truly remorseful he would have cooperated with the government at an early stage, and that fact would have been considered in mitigation. Accordingly, remorse that is unaccompanied by cooperation with the government is not a factor in mitigation.

2. Personal, Family or Business Hardships

These mitigating factors, best considered as a group, will be largely within the personal knowledge of the defendant. They are less within our expertise than are considerations of general deterrence or cooperation with the government.

Obviously, the defendant's age and health, family responsibilities, or extreme business hardship may in some cases present valid reasons for reducing the amount of the sentence actually to be served. The defendant should submit any facts in support of a request for mitigation to the attention of the court and government at an early date, so that the government can determine whether to submit evidence to the contrary. We may wish to utilize FBI investigators or experts, and to hire medical experts, to investigate the substance of proffered economic or personal hardships. The judge, the probation officer and the Director of the Bureau of Prisons also have a range of powers to order and conduct presentence investigations and reports that may be used for the purpose of verifying mitigating factors raised by the defendant. 16/

16/ *E.g.*, 18 U.S.C. § 4208; F. R. Crim. P. 32(c).

Where the government attorney believes that the facts in mitigation clearly call for an early parole, that may be part of the sentence recommendation. Otherwise the burden is on the defendant to argue mitigation. A defendant also has a right to move for a reduction of sentence within 120 days of judgment. 17/ Given that option, we should point out to the court that if there is any uncertainty over the ability of the defendant's health to survive prison, the court should impose a sentence without mitigation, leaving it to the defendant to make a Rule 35 motion for reduction if and when health becomes a problem.

3. Extremely Small, Local Conspiracies

The nature of our enforcement activities inevitably means that some of our cases will involve localized conspiracies, with relatively small amounts of commerce affected. It is important that small, local price-fixing activities are not completely ignored and, until state enforcement resources are considerably expanded, it is essential that we continue to bring prosecutions of this type. In addition, we frequently are simply presented with facts demonstrating a criminal violation, by an informant or otherwise. When that happens, the Division has traditionally felt an obligation to prosecute, even though the amount of commerce involved is small.

Once these cases are brought, however, and the defendants convicted, different considerations from the normal may well apply to sentencing recommendations in these cases. For example, business hardship may be a particularly important mitigating factor where a defendant's company is a small, local firm, largely owned and run by the defendant. In such a case, even a brief period of imprisonment may leave the firm without management and cause it to go out of business. There may be other circumstances in these cases that would call for slightly different sentencing considerations than are outlined here. In any event, in these cases, sentencing recommendations should take into consideration whatever special circumstances may exist.

17/ F. R. Crim. P. 35.

II. RECOMMENDED FINES FOR INDIVIDUALS

Fines are usually poor alternatives to prison sentences and should be used and viewed only as a second choice. 18/ Accordingly, we would prefer to recommend a fine only in those circumstances where we conclude that a prison sentence is not appropriate. However, in practice we shall probably have to back up our prison recommendation with a recommended fine in the event the court should reject all or part of our prison sentence recommendation.

We should recommend prison first and make it clear that was indeed our recommendation. We should then state that, if for some reason a prison sentence was not to be imposed, the defendant should receive our recommended fine. We should also make it clear that to the extent the court imposes a prison sentence which is less than our recommendation, a compensating percentage of the recommended fine should be imposed.

The recommended fine should track the recommended prison sentence. The midpoint in the permissible sentencing range, $50,000, will be the base point, just as 18 months was the base prison sentence. $50,000 may be unduly severe for defendants with net worth below a certain figure. Accordingly, where $50,000 exceeds 25 percent of an individual's net worth, we would use the latter figure as the base point. If in fact we recommend fines only where we do not recommend and receive a prison sentence, it is important that the fine be substantial enough to in fact be a deterrent. The foregoing is based upon the assumption that the individual himself will bear the burden of the fine. If the individual is or will be indemnified, and this is known to us, we should argue this to the court as further reason for imposing a jail sentence.

18/ By way of comparison, it has long been the policy of the Tax Division to always request the imposition of a jail sentence in addition to a fine in criminal cases. It is the position of the Department that the payment of the civil tax liability, plus a fine and suspended sentence or probation, does not ordinarily constitute a satisfactory disposition of a criminal tax case. (Lecture by Cono Namorato, Chief, Criminal Section, Tax Division, New York State Bar Association, November 5, 1976.)

The same factors in aggravation and mitigation as have already been discussed with respect to prison sentences should be applied to increase or decrease the fine. To calculate the fine, we simply translate the recommended prison sentence into dollars. This involves calculating the percentage amount by which the recommended prison term is greater or less than the 18-month base point, and increase or decrease from the fine base point (i.e., $50,000 or 25 percent of net worth) by the same percentage. To illustrate, assume that our recommended prison sentences were 20 months, two months in addition to the 18-month base. That is an increase of one-ninth or 11.1 percent over the base. We should then increase the base fine, be it $50,000 or 25 percent of net worth, by 11.1 percent also.

By tying the determination of the fine to the prison sentence, we have built in the flexibility to enable the court to impose a compensating percentage of the fine in the event our full recommended prison sentence is not imposed. For example, if our recommended prison sentence were 20 months and the judge imposed a sentence of 16 months (four-fifths of our recommendation) we would also want one-fifth of the recommended fine imposed to compensate for the one-fifth prison sentence reduction.

The fine recommendations may seem high in an individual case, especially when compared with past antitrust fines. Accordingly we must be prepared to emphasize to the court the role that the fine must play as a deterrent if no prison sentences or reduced prison sentences are imposed.

III. RECOMMENDED CORPORATE FINES

Corporations profit, or expect to profit, from price fixing. To the extent they are permitted to retain the fruits of their illegal activity, price fixing will persist. An appropriate penalty must at least deprive them of that profit. Given the difficulty of detection and proof of criminal violations of the antitrust laws, the fine must also impose an additional punishment beyond a simple recovery of illegally-earned profits in order to prevent subsequent violations by the same corporation and to deter other violators. However, profits are not the sole criteria, for the aim of the antitrust laws is to deter all price-fixing conspiracies, regardless of whether they were successful or profitable. Accordingly, corporation fine recommendations should be designed to include a substantial penalty, with a substantial minimum fine, perhaps $100,000, based just on the fact of participation in an illegal conspiracy. 19/

The figure we have chosen to penalize and take the profit out of price fixing is a base point of 10 percent of the corporation's total sales in the affected line of commerce by a corporation during the conspiracy. Where there is evidence that this figure is in fact low, such as in specific bid-rigging conspiracies, we shall use the actual percentage increase, and apply this figure to all members of the bid-rigging conspiracy, regardless of whether they were awarded the contract or not. We have attempted to select a figure that is high enough to serve our law enforcement goals, yet not so high as to force a corporation out of business or substantially diminish its competitive viability.

This base fine of 10% of sales (or a higher figure if price fixing raised prices more than 10%) will then be modified by the aggravating or mitigating factors present in a particular case.

In the case of a corporation, recidivism is the chief aggravating factor. Where a corporation has a prior record of antitrust violations, we should recommend a higher fine, often the maximum $1 million fine. At the present time we have not identified any other factors which should be used to increase the corporate fine in all cases. Individual cases may, however, present their own aggravating factors.

Cooperation with the government and ability to pay are mitigating factors. Cooperation in the corporate sense means truly corporate cooperation, evidenced perhaps by corporate counsel providing the government with the necessary information and offering to make all relevant officers, directors and

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19/ Of course, the possibility of treble damages will always exist, and some might argue that this method of calculating fines is simply the governmental equivalent of a damage action. But if economic losses for antitrust violators were limited to illicit gains, that would truly be a license fee. Fines are intended to punish, and the fact and the amount of treble damages are always uncertain. It is simply impractical to try to factor into the calculation of a recommended fine the possibility of treble damage exposure, and we do not plan to do so.

employees available to the government for questioning and as witnesses. Individual cooperation by corporate officials will normally be taken into account in their individual indictment or sentencing decisions, and will not be double-counted in mitigation of the corporate sentence as well.

Ability to pay means whether the fine is so large relative to the corporate profits and assets that the fine would endanger the corporation's continued viability as a competitor. Any fine will injure a corporation to some degree, and put it at a competitive disadvantage. A fine is, after all, an unproductive expenditure not necessarily incurred by a corporation's competitors. [20] That is an unavoidable corollary of any punishment, and we should expect corporations to argue that our recommended fine will hurt their business. If a fine doesn't hurt, it loses its deterrent value. The Sherman Act represents a judgment that price fixing is so injurious to the economy and society that it should be punished as a felony--in essence that the injury to the economy caused by price fixing outweighs the injury to the economy that results from the decreased competitive strength of convicted and fined price fixers.

The balance may tip, however, where the corporation can show that the recommended fine would impose such a burden so as to effectively remove it from the market as a viable competitor. This is a heavy burden to meet. The defendant corporation will have the burden of proving any such contention, but having done so, we should be prepared to decrease our recommended fine.

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[20] To the extent that the price-fixing conspiracy gave a corporation a competitive advantage over non-conspirator competitors, the competitive disadvantage imposed by the fines established a sort of compensating balance.

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CHAPTER III

INVESTIGATION AND CASE DEVELOPMENT

The purpose of this Chapter is to set forth the manner in which the Antitrust Division usually conducts its investigations and the procedural steps that ordinarily should be followed during the course of an investigation. This Chapter will assist attorneys and economists in developing an investigation, both factually and legally, and in making a determination of whether prosecution should be recommended.

The Chapter also describes various other procedures that are part of the Division's investigatory framework, including the Business Review Procedure, the Small Business Procedure and the premerger notification procedures of the Antitrust Improvements Act of 1976.

I. Finding and Evaluating Antitrust Complaints

The Antitrust Division obtains information that forms the bases of investigations in many ways. These include:

1. complaints received from citizens and businessmen when they believe that companies or individuals are engaged in unlawful conduct;

2. complaints and information received from other departments or agencies of the Executive Branch, or from Congress;

3. analysis of particular industry conditions by Division attorneys and economists, including systematic industry screenings; [1]

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[1] The purpose of a screening analysis is to determine whether particular anticompetitive activities may be taking place within an industry. Such investigations are conducted to determine if preliminary inquiry authority is warranted. Such screenings investigations require a "Request for Antitrust File Number" (ATR-170) and an "ACES Report of a New Matter" (ATR-132). See, Division Directives ATR-2710.2 "DOJ File Number Policy" and ATR-2810.1 "Antitrust Caseload Evaluation System (ACES)", respectively, for instructions on the completion of these forms.

4. complaints and referrals received from United States Attorneys and state attorneys general;

5. press reports of various practices that come to the Division's attention through monitoring of newspapers, journals, and the trade press;

6. analysis and evaluation of filings under the premerger notification provisions of the Antitrust Improvements Act of 1976; and

7. monitoring private antitrust litigation to determine whether the Division should investigate the matter.

Because the Division is organized into sections and field offices, each having specific commodity or geographic jurisdiction, there is a rational division of labor among the sections and offices that assists in uncovering suspected violations. In addition, numerous general complaints are sent to the Office of Operations as the clearinghouse for matters brought to the Division's attention from sources outside the Department.

Complaints received by the Division are referred to the appropriate section or field office for review and analysis. The attorney or paralegal who receives the complaint should develop information from the complainant and from trade publications and other public sources. (See, Chapter VI, Section II). Except under unusual circumstances that require the approval of the Office of Operations, the attorney or paralegal should not contact other individuals within the industry, or individuals and corporations that may be implicated in the alleged violation. This rule exists for two reasons: first, the Division does not begin a formal investigation unless a policy and factual determination has been made that an investigation should proceed and should utilize the Division's resources; and second, the Division and the Federal Trade Commission clear investigations with each other before conducting a formal investigation. The purpose of this clearance procedure is to insure that both agencies are not investigating the same conduct, and burdening the parties under investigation by duplicative requests (See, Section II (C), and Chapter VII, Section I, *infra*).

II. Recommending a Preliminary Inquiry

A. Standards for Approving a Preliminary Inquiry

Generally, a preliminary inquiry will be authorized by the Antitrust Division if (a) the facts presented appear to support a legal theory of an antitrust violation; (b) the amount of commerce affected is not insubstantial; (c) the investigation will not duplicate other efforts of the Division, the Federal Trade Commission, a United States Attorney, or a state attorney general; and (d) resources are available to devote to the investigation.

Based on these general guidelines, a request for a preliminary inquiry is reviewed by the Deputy Director of Operations. If the request is approved and FTC clearance is obtained, preliminary inquiry authority is granted.

B. Making a Request for Preliminary Inquiry Authority

Once the attorney has developed a sufficient factual and legal basis to believe that a matter is appropriate for formal investigation, the attorney should prepare a short factual memorandum to the section or field office chief describing the nature and scope of the activity. This memorandum should set forth the following information:

1. the commodity or service to be investigated;
2. the alleged illegal practice (the specific practice should be outlined if practicable, e.g., price fixing, boycott, monopolization, illegal acquisition, etc. -- not merely "restraint of trade");
3. the relevant statute (e.g., Section 1, Sherman Act);
4. the parties involved (state the full name and location of the known companies, as well as individuals involved);
5. the amount of commerce (if information is unknown, state a reasonable estimate); and
6. the geographic area involved (e.g., nationwide, worldwide, Eastern Virginia, etc.).

This detailed information is necessary to evaluate the request, to obtain FTC clearance, and to determine whether any other section or field office is investigating, or has investigated, the same activity.

After this basic information is set forth, the writer should prepare a short factual summary of the information upon which the request is based. Special considerations, such as the existence of private litigation, a statute of limitations problem, or other circumstances relevant to the decision-making process should be discussed. Any particular legal difficulties should also be discussed, if known at this stage.

There are sometimes situations where the staff has already developed sufficient information to request authority to conduct a grand jury investigation or to issue CIDs. In these circumstances, the staff may request preliminary inquiry authority and grand jury or CID authority simultaneously.

The staff memorandum generally is forwarded to the section or field office chief, who refers the matter to the Office of Operations with the chief's recommendation. The memorandum should be accompanied by a Request for Antitrust File Number (ATR-170), and an ACES Report of a New Matter (ATR-132). See Division Directives ATR-2710.2 "DOJ File Number Policy" and ATR-2810.1 "Antitrust Caseload Evaluation System," respectively, for instructions on the completion of these forms.

Upon review by Operations, the investigation is sent to the FTC for clearance and, if approved, assigned to a section or field office. Although the Deputy Director of Operations is primarily responsible for authorizing a preliminary inquiry, he may also consult the Director of Operations, a Deputy Assistant Attorney General, and others within the Division, such as the Economic Policy Office and Evaluation Section, if the matter raises serious legal or factual problems. Absent special circumstances, the section or field office seeking the preliminary investigation will receive the assignment after FTC clearance is received. Special circumstances include special expertise by a certain section or field office or resource problems in a section or field office at a particular time.

C. FTC Clearance Procedure

All requests for authority to initiate a new investigation are cleared with the Federal Trade Commission. The Office of Operations sends each request to the Commission for clearance while the preliminary inquiry request is pending. If there are any questions by the FTC concerning the request, the staff will be notified by the Office of Operations to provide more detailed information concerning the request.

It is important to notify Operations immediately if a section or field office wishes to conduct an investigation where time is of the essence. In merger investigations, if a section is interested in the investigation, the chief or assistant chief should immediately call it to the attention of the Special Assistant in the Office of Operations by telephone or in person so that FTC clearance procedures may be initiated.

When FTC clearance is granted, the Office of Operations will inform the section or field office so that the investigation may begin.

The Division's liaision procedure with the Federal Trade Commission is described fully in Chapter VII, Section I.

D. Referral of a Matter to Another Prosecutorial Agency

Frequently, a particular matter should more properly be investigated by another federal agency or a state or local prosecutorial agency. If the matter involves an issue that is not of direct antitrust significance, it may be referred to an appropriate state or local agency, *e.g.*, a state consumer protection agency.

If the matter is an antitrust problem confined to a specific region, or involves a relatively small amount of commerce, the Division may refer the matter to the antitrust section of the appropriate state attorney general's office or to the United States Attorney in the appropriate district. The Division is attempting to make as many such referrals as practicable to assist state attorneys general in developing strong state antitrust enforcement programs and to encourage United States Attorneys to prosecute local or regional price fixing cases. *See*, Chapter VII, Section II (U.S. Attorneys) and Section III (State Attorneys General).

When a referral to another agency is made, the chief of the section or field office should prepare a letter to the appropriate state or federal official, indicating the facts that have been developed, asking the official to express the agency's interest in the matter, and requesting that the official inform the Division of acceptance or rejection of the referral. In all cases, the letter should be a self-contained document and should never be a copy of internal Division memoranda or work product. It should include any documentation the Division has received, to the extent that disclosure is possible. A copy of each such referral letter should be sent to the Office of Operations.

Each section or field office should prepare a monthly report of all such referrals. The report should be sent to the Office of Operations indicating (a) the nature of the referral; (b) the agency to which referral was made; and (c) whether the referral was accepted.

If the chief of the section or field office, or the staff attorney, has a question regarding a particular referral, he or she should consult with the section or field office's Special Assistant in the Office of Operations.

III. Conducting the Preliminary Inquiry

When preliminary inquiry authority is requested, the staff, in consultation with the chief and assistant chief of the section or field office, should begin to plan the investigation and estimate the time limitations of the investigation. Division Directive ATR-2810.1 "ACES" sets forth the procedures for establishing target dates and estimating resource needs. Obviously, each investigation will be different from any other; however, certain general principles should be employed to assist the staff in (a) allocating resources effectively; (b) obtaining useful documentary and testimonial evidence; and (c) employing the services and technical resources of the Division. See, Chapter VI, Section II.

A. Planning the Investigation

At the beginning of any investigation, the staff should immediately determine the type of conduct involved and the scope of the investigatory effort. Planning sessions should take place at the time the preliminary inquiry request is being processed. At this stage, the chief of the section or field office and the staff should establish a plan describing what is to be done, how and when it will be done, and who will do each task. This investigative plan should also provide for early development of the legal theory to be employed and a determination of the relief to be sought.

Resources available to the staff in beginning the investigation are outlined in the Guide to Conducting Antitrust Investigations (Chapter VI, Section II). The Guide analyzes and defines the Division's investigatory techniques and procedures in detail, including use of economic resources, data processing and other information retrieval methods and other source materials generally found useful in other investigation and litigation efforts.

B. Obtaining Assistance from the Federal Bureau of Investigation

During the course of the preliminary inquiry, the staff may require assistance in conducting interviews of industry officials, locating individuals whose whereabouts are unknown, compiling statistical data, or performing various other investigative functions. When such assistance is necessary, the staff should consider requesting the services of the FBI. The Division encourages the use of the FBI in both civil and criminal investigations.

To obtain FBI assistance, the staff, with the concurrence of the section or field office chief, should prepare a memorandum to the Director, Federal Bureau of Investigation, from the Assistant Attorney General, Antitrust Division. The memorandum should (a) request FBI assistance; (b) provide a general description of the investigation; (c) indicate the geographic area(s) of the investigation; (d) state the type of assistance that the FBI will be asked to provide; and (e) give the names and telephone numbers of the attorneys on the staff with whom the agent should consult.

The memorandum should be sent to the Office of Operations, where it is reviewed by the Deputy Director and processed by the Division's FBI liaison in Washington. If the type of assistance requested is of a particularly sensitive nature, the memorandum will be reviewed by the Assistant Attorney General before being sent to the Bureau.

When the FBI assigns an agent or agents to the matter, they will contact the staff directly and begin the investigation.

After the initial request is made and an agent is assigned, further requests for assistance may be made directly to the assigned agent. Any questions about our liaison with the FBI should be referred to the section's Special Assistant in the Office of Operations.

C. Obtaining Economic and Statistical Assistance

A staff may find it necessary to obtain the assistance of the Economic Policy Office for specific tasks or general consultation during an investigation. Chapter VI, Section I(E) explains in detail the types of assistance that may be provided and the timing of requests for assistance.

As a general matter, the staff should contact the Director or Deputy Director of EPO, or the team leader assigned to the section or field office, to obtain advice about economic and statistical issues that may arise during an investigation. The timing of EPO assistance on various functions is outlined in Chapter VI, Section II.

D. Obtaining Information by Voluntary Requests

During the preliminary inquiry stage, Antitrust Division staffs often rely upon voluntary requests for information from the potential subjects of the investigation, other companies within the industry, customers, trade associations and other sources. In many investigations, the staff will find voluntary information requests useful only at the earliest stages of the investigation. At this stage, the staff may wish to keep contacts less formal and avoid the adversarial tone injected by use of compulsory process. After that time, the staff usually will employ formal civil or criminal process in developing the investigation.

In some civil investigations, the most effective and efficient way to conduct the investigation may be by voluntary information requests. Although total reliance on voluntary requests has become less common in recent years, it is still an alternative to be considered by the staff in developing and implementing its investigative strategy.

Until 1976, reliance on voluntary information was in part necessitated by limitations on the Division's power to issue compulsory process at the pre-complaint stage of a civil proceeding. With the passage of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, which expanded the Division's authority to issue civil investigative demands (CIDs), the Division obtained additional compulsory pre-complaint investigative tools. 1/

1. Considerations In Using Voluntary Information Requests

While there are no firm rules to guide Division attorneys in deciding whether to use a voluntary request or a CID in seeking documents and other information, some guidelines may be of assistance. Generally, when a large volume of documents is sought, it is best to proceed by compulsory process. The formalities of compulsory process are better designed to insure full and timely compliance with an extensive request than the less formal procedures of the voluntary request. Additionally, where an investigation may result in an application for a preliminary injunction, use of CID process should be seriously considered to avoid the possibility that voluntary cooperation may cease or that production of requested documents may be delayed long enough to the point that it interferes with the government's ability to present a strong case for preliminary relief.

1/ See, Section V of this Chapter for a full explanation of the Antitrust Civil Process Act.

2. Confidentiality Considerations

When voluntary requests for information are used in an investigation, the recipients frequently seek assurances that the information they submit will be protected from disclosure under the Freedom of Information Act or that they will be given advance notice if such disclosure is contemplated. For at least two reasons, such assurances should not be provided without clearance from the Office of Operations. First, it is difficult to make binding assurances concerning what will or will not be disclosed in the event of a Freedom of Information Act request; the statute, of course, governs. Chapter VII, Section VI provides a full discussion of the Freedom of Information Act. Second, the administrative burdens involved in negotiating assurances of advance notification and in attempting to comply with the terms of such assurances, sometimes years later, are not easily manageable.

If the recipient of a voluntary request declines to furnish information absent assurances of confidentiality, the better practice is for the staff attorney to prepare a CID compelling the production of the desired documents or information. Documents and other information produced pursuant to a CID are exempt from disclosure under the Freedom of Information Act. 15 U.S.C. § 1314(f).

In unusual circumstances requiring the use of a voluntary request together with some assurance of confidentiality, coordination with the Office of Operations and the Freedom of Information Act Office is necessary to insure that the Division follows a uniform practice in such situations. Under current case law, information voluntarily requested by the Division in connection with an on-going investigation may be exempt from disclosure under the Freedom of Information Act. _Mitsubishi Electric Corp._ v. _U.S. Department of Justice_, 1977-1 Trade Cas. ¶ 61,356 (D.D.C. 1977). The case law recognizes that where the government voluntarily seeks information and disclosure of that information would interfere with the government's ability to obtain such information voluntarily in the future. The government can withhold this information from disclosure under the Freedom of Information Act even though it may have available compulsory process under which it could obtain the documents it has sought voluntarily. This is based on a recognition of the advantages to the government of voluntary compliance as opposed to sometimes cumbersome compulsory process such as civil investigative demands. _Mitsubishi Electric Corp._ v. _U.S. Department of Justice_, _supra_.

On occasion, private counsel have asserted to Division attorneys that information being provided by their clients to the Division is not subject to disclosure under the Freedom of Information Act because it is confidential under 18 U.S.C. § 1905, a statute prohibiting the disclosure of various forms of confidential information by government personnel. There are no reported cases dealing with prosecutions under this statute and a divergence of views exists as to the proper scope of this section and its relationship with the Freedom of Information Act. This problem has been exacerbated by the recent decision of the Supreme Court in Chrysler Corp. v. Brown, 47 U.S.L.W. 4434 (April 18, 1979), and the confusion engendered by that decision as to the propriety of releases made pursuant to the Freedom of Information Act of material that arguably could fall within the meaning of 18 U.S.C. § 1905. Accordingly, the Assistant Attorney General for the Criminal Division has announced that the Criminal Division will not prosecute government employees for a violation of 18 U.S.C. § 1905 if the release of information in question was made in a good faith effort to comply with the Freedom of Information Act and the applicable regulations. See, U.S.A.M., 9-2.025.

E. Status Reports on Investigations

While the Antitrust Division does not employ a general policy of interim status reports on investigations other than the reporting requirements of ACES, a section or field office chief may find it helpful to have the staff summarize an investigation to determine whether it is useful to continue the investigation, whether the theory on which the staff has relied is viable, and what further work must be done to conclude the investigation. This practice is especially important in investigations that require substantial time and resources and, in some cases, such status reports may be requested by the Office of Operations or the Assistant Attorney General.

F. Standards for Determining Whether to Proceed By Civil or Criminal Investigation

While many investigations that are conducted by the Antitrust Division are by their very nature civil investigations, e.g., merger investigations, there are some situations where the decision to proceed by criminal or civil investigation requires considerable deliberation.

Because the Sherman Act is both a civil and a criminal statute, the Division historically has proceeded by criminal investigation and prosecution in two types of cases: (1) cases involving *per se* antitrust violations; for example, price fixing, bid rigging, and horizontal customer and territorial allocations; and (2) cases where there is evidence that the defendants knew that they were violating the law and acted with flagrant disregard for the legality of their conduct. There are a number of situations, however, where, although the conduct may appear to be a *per se* violation of law, criminal investigations or prosecution may not be considered appropriate. These situations involve areas where: (1) there is confusion in the law; (2) there are truly novel issues of law or fact presented; (3) there is confusion caused by past prosecutorial decisions; or (4) there is clear evidence that the subjects of the investigation were not aware of, or did not appreciate, the consequences of their action. 2/

During the preliminary inquiry stage of the investigation, the staff makes the determination whether any further investigation will be conducted as a civil or criminal investigation. Where it is unclear whether the conduct in question would be a civil or criminal violation, it is usually the better practice to begin the investigation as a civil investigation.

G. Evaluating the Results of a Preliminary Inquiry

The normal period of time required to conduct a preliminary inquiry ranges from a few weeks to several months. After this period, the staff should be prepared to proceed by further voluntary requests, by CID, or by grand jury, or to close the investigation.

In making this determination, the staff should consult with the section or field office chief to discuss the results of the investigation. In many investigations, the next step in the investigation will be relatively clear; however, in others the decision whether to continue the investigation will require considerable deliberation and consultation. If there are considerable questions that remain to be resolved, the section or field office chief may wish to consult informally with Operations before making a recommendation.

2/ Remarks by John H. Shenefield, Assistant Attorney General, Antitrust Division, "Antitrust Enforcement to Preserve the Competitive Market Place," Cleveland, Ohio, April 18, 1979; Donald I. Baker, "To Indict or Not To Indict," 63 Cornell L. Rev. 405 (1978).

The staff recommendation to proceed by grand jury investigation or by CID investigation must be processed through the Office of Operations and the appropriate Deputy Assistant Attorney General, and such investigations require the approval of the Assistant Attorney General.

H. Closing a Preliminary Inquiry

If, after analysis of the conduct or transaction, the staff and the section or field office chief believe that the matter should not be investigated further, staff should prepare a memorandum recommending that the investigation be closed. If the chief concurs, the recommendation is sent to the Deputy Director of Operations who will review it and either close it or request additional information or investigation. In investigations involving significant policy questions, the Deputy Director may consult with the Director of Operations, the appropriate Deputy Assistant Attorney General or the Assistant Attorney General. The Deputy Director may occasionally seek advice from the Economic Policy Office or the Evaluation Section, if the closing involves a question within their respective areas of expertise.

When the decision is made to close the investigation, the Deputy Director of Operations will notify the section or field office chief of the decision by memorandum. The staff should then close its file on the matter and process all documentary material received during the investigation in accordance with the provisions of Division Directive ATR-2710.1 "Maintenance, Destruction, and Removal of Antitrust Division Documents."

IV. Conducting a Merger Investigation

Until 1978, the Antitrust Division and the Federal Trade Commission investigated proposed mergers and acquisitions to which each agency was alerted by the complaints of counsel, citizen information, or reports in the trade press. This often made full investigation difficult prior to the consummation of mergers or acquisitions.

The premerger notification provisions of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 added § 7A to the Clayton Act, 15 U.S.C. § 18a (see full text at II-23 to II-30), to require enterprises exceeding certain thresholds, see infra, to notify the Division and the FTC of the proposed transaction and submit documents and other information to the agencies concerning the transaction. The notification program became effective in 1978 upon the promulgation of premerger notification regulations in accordance with the Act.

Because the majority of acquisitions and mergers that the Division may consider anticompetitive fall within the premerger rules, most of the Division's merger investigations will be conducted under the provisions of the Act. This section describes the provisions of the premerger notification statute and rules and the manner in which the Division will investigate mergers and acquisitions. Numerous practical suggestions concerning merger investigations also are discussed in Chapter VI, Section II.

A. Premerger Notification

This section describes the premerger notification procedures employed by the Division and the FTC. Title II of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 18a, requires certain enterprises merging or entering into acquisition transactions to notify both the Antitrust Division and the Federal Trade Commission and submit certain information to both agencies. After notification, the parties must wait a specified time (15 days for cash tender offers, 30 days for other acquisitions) before the transaction can be consummated. The statute also allows the enforcement agencies to make a request for additional information which extends the waiting period.

The statute grants broad rulemaking authority to the Division and the FTC to implement Title II. The Rules, Regulations, Statements and Interpretations under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 "(Rules)" were published in 43 Fed. Reg. 33,450 (July 31, 1978), and are codified at 16 C.F.R. §§ 801-803. Questions regarding specific aspects of the rules should be directed to the FTC Liaison Office in the Office of Operations or to the section or field office's Special Assistant in Operations.

1. A Basic Guide to the Premerger Notification Statute and Rules

This section sets forth the basic rules with which attorneys conducting merger investigations should be familiar. The complete text of the Rules and Regulations should be consulted for specific information. This section provides a general guide to the requirements of the statute and the Rules.

(a) Determining Whether the Act Applies (Part 801)

(1) Tests

The statute sets out three tests for determining who must report a transaction:

a. commerce test -- either the acquiring, or the acquired, person must be engaged in commerce or in any activity affecting commerce;

b. size-of-person test -- the acquiring person must have total assets or annual net sales of $100 million and must be acquiring voting securities or assets of a manufacturing person with annual net sales or assets of $10 million, or a non-manufacturing person with assets of $10 million. Similarly, the act is triggered if any person with total assets or annual net sales of $10 million is acquiring voting securities or assets of any person with annual net sales or total assets of $100 million; and

c. size-of-transaction test -- as a result of such acquisition, the acquiring person must hold 15 percent or more of the voting securities or assets of the acquired person, or voting securities and assets worth in the aggregate more than $15 million.

(2) Definitions

Part 801 of the Rules defines the terms in these tests and the methods for calculating whether the size-of-person and size-of-transaction tests are met.

The definitions of "person," "entity," and "ultimate parent entity" in Section 801.1(a) and the definition of "hold" in Section 801.1(c) of the Rules will be particularly important in making these determinations.

The Rules define person broadly to include a complete corporate structure (a collection of all entities, *i.e.*, subsidiary and related corporations, under ultimate common control). The definitions of "acquiring person" and "acquired person" are stated in Section 801.2(a): any person who, as a result of an acquisition, will hold voting securities or assets, either directly or indirectly, or through fiduciaries, agents, or other entities acting on behalf of such person, is an acquiring person. One transaction may consist of, or may give rise to, several distinct "acquisitions" potentially subject to the Act. Section 801.11 explains how to calculate whether the "size-of-person" test is met.

(3) Calculating the Thresholds

Sections 801.10 and 801.12 of the Rules explain how the percentages and valuation tests are performed to determine whether the 15 percent/$15 million thresholds are met.

(4) Special Types of Transactions

Part 801 also contains a series of rules dealing with special types of transactions. Section 801.4 explains the concept of "secondary acquisitions." Whenever as a result of an acquisition ("the primary acquisition"), an acquiring person will obtain control of an issuer that holds voting securities of another issuer which it does *not* control, then that second aspect of the acquisition (the secondary acquisition) is separately subject to the Act and the Rules by reason of Section 801.4.

Section 801.30 provides that the waiting period begins for a secondary acquisition when the acquiring person files.

The acquired person must be notified of that filing in advance by the acquiring person and then must file within 15 days (or, in the case of cash tender offer, 10 days). Similar treatment is provided for: (a) acquisitions of voting securities on a national securities exchange or "over the counter," (b) acquisitions of voting securities by shareholders of the target company in a tender offer, (c) acquisitions of voting securities by means of a tender offer, (d) acquisitions (other than mergers and consolidations) in which voting securities are acquired from someone other than the issuer or related entity, and (e) acquisitions resulting from conversion of convertible voting securities. Additional provisions relating to acquisitions of voting securities by shareholders of the target company in a tender offer are contained in Section 801.31.

Section 801.32 makes clear that conversion of convertible voting securities is a potentially reportable acquisition under the Act. Section 801.40 establishes the reporting scheme for formation of new corporations, particularly new corporate joint ventures. Section 801.40(b) contains its own size-of-person tests applicable to any transaction (except in connection with a merger or consolidation) in which a new corporation is formed, provided that the criteria of the commerce and size-of-transaction tests are satisfied. A special rule for determining the total assets of the new corporation is stated in Section 801.40(c), and a special rule relating to the commerce test of § 7A(a)(1) of the Clayton Act is contained in Section 801.40(d).

(b) Exemptions to the Reporting Requirements (Part 802)

Exemptions to the reporting scheme are found in §§ 7A(c)(1) through (c)(11) of the Clayton Act. These statutory exemptions include:

(1) Acquisitions of goods and realty in the ordinary course of business;

(2) Acquisitions of non-voting securities;

(3) Acquisitions, solely for the purpose of investment, by any bank, banking association, trust company, investment company, or insurance company of (a) voting securities pursuant to a plan of reorganization or dissolution; or (b) assets in the ordinary course of its business;

(4) Transactions related to certain statutes, such as the Bank Holding Company Act (in certain cases, material submitted to the agency must be filed with the FTC and the Antitrust Division 30 days before consummation.

(5) Transfers to or from a federal agency or a state or a political subdivision thereof;

(6) Transactions specifically exempted from the antitrust laws; and

(7) Transactions specifically exempted from the antitrust laws if approved by a federal agency and if copies of all material submitted to such agencies are contemporaneously filed with the FTC and the Antitrust Division.

Part 802 of the Rules explains these exemptions and contains additional ones. For example, Section 802.8 exempts certain supervisory acquisitions of savings and loan institutions. Section 802.20 exempts smaller acquisitions which would be reportable only because of the 15 percent test. Section 802.21 exempts acquisitions of voting securities if a notification threshold will not be met or exceeded. (The notification thresholds are defined in § 801.1(h).) Section 802.23 deals with renewed and amended tender offers. Section 802.30 exempts intra-enterprise transactions. Sections 802.50-53 exempt many types of transactions dealing with foreign assets and/or foreign persons. Certain acquisitions by creditors, insurers, and institutional investors are also exempted by Sections 802.63-64.

(c) Filing Mechanics

Part 803 outlines the reporting procedures. The Notification and Report Form (Appendix to Part 803 of the Rules) must be completed in accordance with Section 803.1, and with the instructions appearing in Section 803.2 and on the form itself. Whenever the person filing notification is unable to supply a complete response to any item on the form, a statement of reasons for noncompliance must be supplied, in accordance with Section 803.3. Each Notification and Report Form must be accompanied by one or more affidavits and each form must be certified, as provided in Sections 803.5 and 6 of the Rules.

In the special case in which a foreign acquired person refuses to file notification, Section 803.4 may apply.

Section 803.7 provides that reported transactions must be consummated within one year following the expiration of the waiting period. If the reported transaction is not consummated within one year, an additional filing must be made.

(d) Waiting Period

§§ 7A(a) and (b) of the Clayton Act state that, where notification is required with respect to a contemplated acquisition of assets or voting securities, that transaction may not legally be completed until notification has been accomplished and a thirty-day waiting period has thereafter expired (only fifteen days is required in the case of a cash tender offer).

Section 803.10(a) of the Rules explains when the waiting period begins, and Section 803.10(b) explains when it expires. §§ 7A(b)(2) of the Clayton Act permits the FTC and the Assistant Attorney General in charge of the Antitrust Division to terminate the waiting period before it expires in certain cases (*see* A(4), *infra*).

(e) Contents of the Form

The Notification and Report Form appears as an appendix to Part 803 of the Rules. It is designed to provide the enforcement agencies with the information needed for an initial evaluation of any competitive impact of a proposed acquisition. The following information is requested by the form:

The form identifies the reporting person.

Item 1 then identifies what type of transaction is being reported and in what capacity the reporting person is reporting (*e.g.*, as an acquiring person, as an acquired person, etc.).

Item 2 identifies all other parties to the transaction and requires a description of the assets and/or securities to be acquired. The item also requires disclosure of the proposed consummation date and submission of certain documents constituting the agreement.

Item 3 requires a recapitulation of the 15 percent/$15 million tests as established in § 7A(a)(3) of the Clayton Act.

Item 4 requires that the reporting person furnish copies of a variety of documents containing basic business information. Item 4(a) seeks a number of Securities and Exchange Commission documents including proxy statements, 10-Ks, 10-Qs, 8-Ks, and registration statements. Item 4(b) requires submission of annual reports, annual audit statements, and balance sheets. Item 4(c) asks for studies, surveys, analyses, and reports prepared by or for officers or directors for the purpose of evaluating or analyzing the acquisition with respect to various aspects of competition.

Item 5 requires submission of revenue data on a 4, 5, and 7-digit SIC (Standard Industrial Code) basis. Four-digit data are sought for 1972 (when 1977 data are available that data will be required). More detailed 7-digit product data for 1972 are also sought. These 7-digit data must be updated to reflect new or deleted products. Five-digit data for manufacturing industries are sought for the most recent year while four-digit data are sought for the most recent year for non-manufacturing industries. These data can be used to make preliminary judgments concerning product markets.

Item 6 seeks information on significant (but less than controlling) shareholders and shareholdings of the reporting person.

Item 7 requires submission of geographic market data for transactions where four-digit industry overlaps exist.

Item 8 seeks information on significant vendor-vendee relationships between the parties to an acquisition. This question is intended to reveal vertical implications of the proposed transaction.

Item 9 seeks merger history data where 4-digit SIC code overlaps exist.

(f) Requests for Additional Information or Documentary Material

Under § 7A(e) of the Clayton Act, the Division or the FTC may make a single request for additional information or documentary materials. This is commonly referred to as a "second request." A second request must be made prior to the expiration of the thirty-day waiting period (or in the case of a cash tender offer, the fifteen-day waiting period) and must seek information relevant to the proposed acquisition.

A second request, which is a form of compulsory process, may be made to the parties to an acquisition or to officers, directors, agents, or employees of the parties. A second request extends the waiting period before which the transaction may be consummated for twenty days (or in the case of cash tender offers, ten days) from the time when the additional material is submitted to the Division. [1]

Sections 803.20 and 803.21 of the Rules set forth the procedures by which second requests are to be made. Second requests can be made in person, by telephone, or by mail. A written request is effective when received by the filing person. If the request is communicated in person or by telephone, it is effective when made, provided that written confirmation is mailed within the original waiting period.

(g) Other Provisions of the Act and the Rules

(1) Request for Expedited Treatment

§ 7A(f) of the Clayton Act provides for expedited treatment by a United States district court of a motion by either the Division or the FTC for a preliminary injunction to prevent consummation of a proposed transaction reportable under the Act.

(2) Enforcement of the Act

§§ 7A(g)(1) and (g)(2) of the Clayton Act provide the enforcement mechanisms for the Act. Under § 7A(g)(1), any person (or any officer, director or partner thereof) who fails to comply with any provision of the Act (or the Rules) may be liable for a civil penalty of up to $10,000 for each day during which such person is in violation of the Act. Only the Department of Justice can seek this civil penalty.

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[1] There is one exception to the waiting period extension. When a second request is directed to a party whose voting securities are sought to be acquired in a tender offer (the target), or to any officer, director, partner, agent or employee of that party, the waiting period will not extend to the date of submission by that party. The target must still respond to the request within a reasonable time under Section 803.21 or may be subject to enforcement proceedings under § 7A(g) of the Act. 16 C.F.R. § 803.20.

If the notification requirements of the Act and the Rules are not substantially complied with, § 7A(g)(2) of the Clayton Act permits either enforcement agency to commence an action in United States district court. Under this section, the court may order compliance and is required to extend the waiting period "until there has been substantial compliance." The Act contains one exception: where a person whose stock is sought to be acquired by means of a tender offer (either cash or non-cash) has not complied, the waiting period may not be extended, although civil penalties may be assessed. § 7A(g)(2)(C) also permits the court to "grant such other equitable relief as the court in its discretion determines necessary or appropriate."

(3) Confidentiality of Form

§ 7A(h) of the Clayton Act states that any information or documentary material filed with the enforcement agencies under the Act is exempt from disclosure under the Freedom of Information Act and that no such information or documentary material may be made public except "as may be relevant to any administrative or judicial action or proceeding."

The fact of filing, unless otherwise publicly disclosed, is included within this confidentiality requirement. Of course, to the extent necessary, a transaction may be disclosed in connection with the Division's legitimate investigatory inquiries. The Division and the FTC also interpret the confidentiality clause to mean that the administrative or judicial action or proceeding must be one to which either the Commission or the Antitrust Division is a party, and the decision to make any such information public under these circumstances lies solely in the discretion of the enforcement agencies.

(4) Relationship of Premerger Notification to Other Statutes

§ 7A(i) contains two important explanations of the relationship between the Act and other activities of the Division and the FTC. Under § 7A(i)(1), any action by either agency or any failure of either agency to take any action under the premerger notification legislation has no effect on any proceeding under any other provision of the Antitrust Improvements Act of 1976 or any other provision of law. Moreover, the ability of the enforcement agencies to make full use of the Antitrust Civil Process Act, the Federal Trade Commission Act, and any other provision of law "to secure at any time from any person documentary material, oral testimony, or other information" is not affected by the premerger notification requirements.

2. Procedures in Obtaining and Reviewing Premerger Filings

(a) Receiving and Distributing Filings

The person filing the premerger notification forms with the Antitrust Division must submit three copies of the form (with one set of attachments) to the Office of Operations. After the filing is dated and logged in, the forms will be immediately distributed to the appropriate litigating section or field office and to EPO. The forms should be examined to determine whether FTC clearance should be sought.

The FTC Liaison Office should be notified whether preliminary inquiry authority will be sought within three working days of receipt of notification. If the staff wishes to recommend a preliminary inquiry, it is essential that the regular request memorandum be forwarded to the Office of Operations. Early action by the staff is necessary to expedite FTC clearance and begin the investigation.

(b) Assessing the Completeness of the Filing

While reviewing a premerger filing, if the attorney determines that the filing is incomplete or that questions have been answered inaccurately, the attorney should not contact the filing party directly. The FTC has the responsibility of notifying the parties of insufficient and incomplete filings. The attorney should contact the FTC Liaison Office concerning the problem and the information will be relayed to the FTC.

(c) Requesting Amplification and Clarification

Additionally, it should be remembered that premerger notification does not limit the ability to seek information voluntarily. The Rules specifically allow the enforcement agencies to request amplification and clarification of the initial information filed. Such requests are informal and voluntary and do not extend the waiting period, nor do they exhaust the Division's second request authority. Requests for clarification and amplification can be extremely useful in helping determine that the Division has no interest in the transaction or in helping narrow and focus areas of concern. Care should be taken, however, to inform the party from whom the information is sought that the request is not pursuant to a formal "second request."

Normally, preliminary inquiry authority should be obtained before amplification or clarification is sought. Once preliminary inquiry authority is granted, Operations need not be informed of informal requests for amplification and clarification. If timing problems exist, informal information requests can be made without preliminary inquiry authority; here, however, the Office of Operations should be notified so that the matter can be coordinated with the FTC.

(d) Returning the Filings to the FTC Liaison Office

If a determination is made that a preliminary inquiry should not be requested, all premerger materials should be returned as soon as possible to the FTC Liaison Office. It is important that attorneys not retain documents from the filings which are of interest to them. All of the filings are being put on microfiche for storage and future reference, and it will be impossible to maintain a complete record if materials from the filing are not returned. See Division Directive ATR-2710.1 "Maintenance, Destruction and Removal of Antitrust Division Documents."

A second reason that attorneys should not retain copies of premerger materials is that an inadvertent violation of the confidentiality provision may occur in the future since each document and page within a filing is not stamped "confidential," and it may be possible for some person in the future to unwittingly misuse the document.

3. Second Request Authority

(a) Procedures

By agreement with the FTC, a request for additional information can only be made after a matter has been cleared to one of the enforcement agencies. Thus, within the Antitrust Division, preliminary inquiry authority is a necessary prerequisite to obtaining second request authority.

The process for obtaining authority to send a second request is similar to the process of obtaining CID authority. *See* Section V(C), *infra*. Second requests require approval by the Deputy Assistant Attorney General for Litigation, who has been delegated this authority by the Assistant Attorney General. Such requests should be submitted in completed form to the Office of Operations; that Office will review the request and submit it to the Deputy Assistant Attorney General for Litigation, who reviews and signs the requests.

A request for additional information must be signed and communicated to the parties within the initial waiting period. Second request authority should be sought as early as practicable in the initial waiting period. Also, only one second request can be made to each party to the transaction so a proposed second request should be complete. The proposed letters should be received by the Office of Operations for review at least two full business days before the initial time period expires.

Because of the effect a second request may have on the transaction, Division staffs should assess the need for and scope of additional requests carefully.

(b) Form of the Request

Second request letters should ask for relevant information and documents that the staff needs from the parties to evaluate the competitive aspects of the transaction.

(c) Suggested Language for Introductory and Closing Paragraphs of Second Request Letters

Introduction:

> Pursuant to Section 7A(e)(1) of the Clayton Act, 15 U.S.C. § 18a, and Section 803.20 of the Premerger Notification Rules and Regulations, 16 C.F.R. § 830.20, the Antitrust Division requests additional information and documents relevant to the proposed acquisition [merger] of ____________ by [with] ____________. As provided by Section 18a(e)(2) of the Clayton Act, and 16 C.F.R. § 803.20, this second request for information extends the waiting period before which this proposed transaction may be consummated for ______ days from the date of receipt by the Antitrust Division of all materials requested herein. 2/
>
> > [set forth specific numbered requests for information and documents, as well as any relevant definitions and the time period of the request]

2/ The language extending the time period should not be included in a second request letter to a tender offer target. See footnote 1 at III-20.

Closing:

While the Premerger Notification Rules require that the additional material be filed with the Director of Operations, Antitrust Division, Room 3218, Department of Justice, Washington, D.C. 20530, either by hand or by registered or certified mail, you may comply with the rules by filing the material with the _______________ Office [Section] of the Antitrust Division, Department of Justice, [address], and simultaneously submitting a letter verifying delivery to the Director of Operations at the above address.

If you have any questions regarding this request for additional information, please contact [name and telephone number of staff attorney].

Sincerely yours,

Deputy Assistant Attorney General
Antitrust Division

(d) Obtaining the Second Request Materials

It is the responsibility of the staff attorneys conducting the investigation to inform the FTC Liaison Office when all of the second request materials have been submitted so that the office can calculate the additional waiting period and provide the FTC with that information.

The staff should also notify the filing parties by letter that the request is complete and give them the date the waiting period will expire. If the parties have made a deficient submission, the Office of Operations should be notified immediately. A short memorandum should be prepared explaining the deficiency and letters should be drafted for the signature of the Deputy Assistant Attorney General for Litigation informing the parties of the deficiency and that the new waiting period has not begun to run. Upon authorization to issue the letters, the staff should immediately call the parties and inform them of the deficiency and the fact that the new waiting period has not begun to run.

4. Early Termination of the Waiting Period

On occasion, companies request early termination of the regular waiting period or of the waiting period following a second request.

A formal interpretation has been issued setting forth the standards for early termination. All early terminations must be cleared through the FTC and published in the Federal Register. Therefore, if an attorney is contacted concerning an early termination, he or she should inform the requestor that a request for early termination should be submitted in writing to the Division. The section or field office Chief should forward the requestor's letter to the Division's FTC Liaison Office with a memorandum describing the situation and presenting the staff's views. If the request involves an investigation for which preliminary inquiry authority has been obtained and the Chief concurs in granting early termination, the memorandum should recommend closing the investigation or explain why early termination should be granted, even though the investigation is continuing.

The Division's decision will then be communicated to the FTC which will notify the parties and take care of the procedural requirements.

Frequently, requests for early termination are received as to filings where no investigation was opened. In such situations, the FTC Liaison Office will contact the attorney who reviewed the filing and if there is no objection, will orally notify the FTC that early termination may be granted.

B. Other Investigative Resources

The Premerger Notification Rules do not foreclose the Division from employing other investigative resources during the course of the merger investigation. Materials may be obtained from competitors, customers, trade associations and other relevant parties through the use of voluntary requests and Civil Investigative Demands. Civil Investigative Demands may be especially useful in obtaining information quickly, especially when there is a possibility that the Division may challenge the acquisition by temporary restraining order or preliminary injunction.

Chapter VI describes the other resources available to the staff investigating a merger. It should be noted, however, that the assistance of the Economic Policy Office is essential in merger investigations. EPO should be consulted well before the staff drafts its second request questions and before CIDs or voluntary requests to other parties are issued.

C. Procedures for Recommending Suit

While the second request materials are being studied and all CID or voluntary request materials are being compiled, staff should assess the possibility of challenging the acquisition. If it appears likely that the staff will recommend challenging the acquisition prior to consummation, it should begin to prepare its fact memorandum and the pleading papers at the earliest point practicable. Staff should also begin to prepare the affidavits and exhibits as it completes its investigation.

The legal basis for challenges to acquisitions prior to consummation is set forth in detail in Chapter IV, Section II, infra, and that analysis should assist the staff in preparing the necessary papers. Staff should also consult the Exemplar File for specific pleadings.

The economists assigned to the case should begin to prepare affidavits and exhibits that will accompany the pleadings and be used at any preliminary hearing, if suit is brought. See Chapter VI, Section II.

Because of the time constraints placed on the staff by the Premerger Notification Rules, the Office of Operations should be informed as soon as the staff believes a case recommendation is likely. Operations should be made aware of the timing of the transaction and the date on which staff must file a suit.

V. Issuing Civil Investigative Demands

A. The Antitrust Civil Process Act

In the Antitrust Civil Process Act, 15 U.S.C. §§ 1311 to 1314, the Congress provided the Antitrust Division with compulsory pre-complaint civil investigative process. The Hart-Scott-Rodino Antitrust Improvements Act of 1976 amended the Antitrust Civil Process Act and substantially expanded the compulsory civil process powers of the Division. The full text of the Act appears at II-42 to II-54.

Under the amended Act, the Assistant Attorney General, whenever he has reason to believe that a person may be in the possession of information relevant to a civil antitrust investigation, may cause to be served on that person a civil investigative demand (CID) requiring the production of documents, answers to written interrogatories, or oral testimony. CIDs may be directed to any natural person, corporation, partnership, or other legal entity during a civil investigation of a past or present violation or during a civil investigation of an incipient violation, such as a proposed merger, acquisition, joint venture, or similar transaction. CIDs may be issued to subjects of the investigation and to third parties with relevant information. As in civil discovery in the federal courts, a person may be served with CIDs requiring a combination of types of responses. 15 U.S.C. § 1312(a).

CIDs also may be issued to investigate possible violations of a final order, decree, or judgment in an antitrust case, since the term "antitrust violation" is defined to include acts in violation of any such order, decree, or judgment. 15 U.S.C. § 1311(b) and (d). The amended Act also makes clear that CIDs may be directed to persons ". . . acting under color or authority of state law." 15 U.S.C. § 1311(f). From the legislative history, it appears that this language is intended to allow an investigation to continue despite a contention that the activities under investigation are immunized under the state action exemption, at least until it is clear that the exemption is applicable. The House Report on the Antitrust Improvements Act of 1976 noted that a CID recipient may refuse to comply with a CID if the Division has no jurisdiction to conduct an investigation, which would be the case if the activities at issue were clearly exempt from the antitrust laws. However, the House Report stressed that the scope of many antitrust exemptions is not precisely clear, and that in many cases, the applicability of an asserted exemption may be a central issue in the case. Consequently, the House Report concluded that the mere assertion of an exemption should not be allowed to halt the investigation. 1/

Use of CIDs is restricted to the pre-complaint stage of civil investigations. Occasionally, investigations which initially contemplate possible civil enforcement action uncover evidence of criminal violations necessitating investigation by grand jury. In this situation, the Division's authority to use CIDs in that investigation ceases. 2/ Of course, any evidence previously collected by CID may be presented to the grand jury. 15 U.S.C. § 1313(d)(1).

CIDs can only be used to investigate possible violations of the antitrust laws or of a final order, decree, or judgment arising under the antitrust laws. As used in the Act, the term "antitrust laws" means the Sherman Act, the Clayton Act, the Wilson Tariff Act, and any statute enacted after 1962 that prohibits, or makes available to the United States any civil remedy with respect to, any restraint upon or monopolization of interstate or foreign commerce. 15 U.S.C. § 1311(a). In practical terms, this means that CIDs cannot be used to investigate violations of the Federal Trade Commission Act or of Section 3 of the Robinson-Patman Act, 15 U.S.C. § 13a, which provides criminal penalties for certain predatory pricing activity.

Earlier versions of the 1976 amendments would have given the Division the authority to use CIDs in connection with the Division's participation in proceedings before federal regulatory agencies. Although that version of the legislation did not survive, the amendments do authorize use of CID information in agency proceedings where it was originally gathered for other purposes. 15 U.S.C. § 1313(d)(1).

B. History of the Antitrust Civil Process Act

The Act had its origin in the work of the 1955 Attorney General's National Committee to Study the Antitrust Laws.

1/ H.R. Rep. No. 94-1344, 94th Cong., 2d Sess. 11 (1976), reprinted in [1976] U.S. CODE CONG. & AD. NEWS, 2956, 2606, note 30. See Amateur Softball Ass'n of America v. United States, 467 F.2d 312 (10th Cir. 1972).

2/ H.R. Rep. No. 94-1343, supra note 1 at 2603.

In its final report, the Committee noted that one of the problems faced by the Department of Justice in effectively enforcing the antitrust laws was the lack of compulsory process to obtain evidence during investigations where civil proceedings were contemplated from the outset. 3/ As the Committee pointed out, inadequate investigative tools may lead to incomplete investigations that may in turn mean civil proceedings that a more careful search and study would have shown to be unjustified. The ultimate social cost may be ". . . a futile trial exhausting the resources of the litigants and increasing court congestion." 4/ To remedy this deficiency, the Committee recommended legislation that would authorize the Department of Justice to issue civil investigative demands requiring the production of documents relevant to a civil antitrust investigation.

The need for legislation providing the Division with pre-complaint civil investigative tools was buttressed by the Supreme Court's decision in United States v. Procter & Gamble Co., 356 U.S. 677, 683 (1958), which condemned the use of the grand jury for the purpose of eliciting evidence for a civil case. This decision drew further attention to the fact that the Division was forced to rely in civil investigations on the voluntary cooperation of those under investigation. Responding to the problems inherent in sole reliance on voluntary cooperation, the Congress passed the Antitrust Civil Process Act in 1962. 5/

3/ REPORT OF ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS, 343-345 (1955).

4/ Id. at 344.

5/ Soon after its enactment, CIDs issued under the Act were challenged on constitutional grounds; however, such challenges were rejected by the courts. Hyster Company v. United States, 338 F.2d 183 (9th Cir. 1964); Petition of Gold Bond Stamp Company, 221 F. Supp. 391 (D. Minn. 1963), aff'd, 325 F.2d 1018 (8th Cir. 1964); and Petition of Columbia Broadcasting System, Inc., 235 F. Supp. 684 (S.D. N.Y. 1964).

As originally enacted, the Act was limited in scope. It only authorized the issuance of CIDs for the production of documents, and it restricted use of CIDs to companies or other non-natural persons under investigation. This meant that the Division could only use the compulsory CID process to obtain documents from corporations, partnerships or other non-natural persons that were the targets of a civil investigation.

In 1965, the narrow reach of the original Act was confirmed by the Ninth Circuit's decision in United States v. Union Oil Company of California, 343 F.2d 29, 31, where the court concluded that a CID had to be ". . . confined to material relevant to the ascertainment of whether or not a person 'is or has been engaged in any antitrust violation.'" The court held that this did not include investigations of activity, such as proposed acquisitions or mergers, that would be a violation in the future.

While the original Act assisted the Division's civil enforcement efforts, the restrictions placed by the Act limited its value. The Hart-Scott-Rodino Antitrust Improvements Act of 1976 amended the Act to provide the Division with additional tools for the conduct of effective civil investigations. As discussed in Section A, supra, the amended Act permits the Division to issue CIDs for oral testimony and interrogatory answers, as well as for documents, and it permits CIDs to be served on natural persons, as well as on corporate or other legal entities. The amendments also allow CIDs to be used to investigate incipient violations such as mergers and permit CIDs to be served on non-targets as well as targets.

C. Procedures for Issuing CIDs

The Act requires that all CIDs be signed by the Attorney General or the Assistant Attorney General in charge of the Division. 15 U.S.C. § 1312(a). This authority cannot be delegated. In practice, this means that all CIDs are reviewed and approved personally by the Assistant Attorney General or, in his absence, the Acting Assistant Attorney General.

After a section or field office has begun to conduct a preliminary inquiry into a possible civil antitrust violation, it may request the Assistant Attorney General to issue CIDs in connection with the investigation. The request is made by forwarding a memorandum explaining the need for the CIDs with the requested CIDs attached to the section or field office Chief. The Chief will then review the materials and prepare a cover memorandum with the Chief's views and recommendation. The Chief should also attach a completed ACES Matter Update Report (ATR-133). See Division Directive ATR-2810.1(4)(c), "ACES". The entire package should then be sent to the Office of Operations.

CIDs should be on the appropriate printed form: ATR-154 (Civil Investigative Demand-Documentary Material), ATR-155 (Civil Investigative Demand-Oral Testimony), or ATR-156 (Civil Investigative Demand-Written Interrogatories). These forms are printed in white and blue. For each CID, one white (original) copy and five blue copies should be submitted to the Office of Operations. The white (original) copy of the CID and one blue copy are for service. The remaining blue copies are distributed, one each to the Office of Operations, the Correspondence Unit, the Legal Procedure Unit, and the section or field office requesting the CID.

If the CID is for documents or written interrogatories, the original of the appropriate schedule of documents or interrogatories should be attached to the white copy of the CID and copies of the schedule should be attached to the blue copies.

The Office of Operations reviews the memorandum and the CID forms and schedules; the materials normally are reviewed by the Special Assistant in the Office of Operations for the section or office and the Deputy Director of Operations. The CIDs are then forwarded with a recommendation to the appropriate Deputy Assistant Attorney General, and, ultimately, to the Assistant Attorney General for review and signature.

Once a CID is signed by the Assistant Attorney General, it is given an identifying number by the Legal Procedure Unit. The Office of Operations then either returns the CID to the requesting section or field office for service or itself arranges service. Operations generally arranges service only when a field office has requested the CIDs, since return to the field office may cause a delay in the service of the CIDs.

D. Service of CIDs

The manner in which a CID can be served is set forth in 15 U.S.C. § 1312(d), (e), and (f). Service of an executed copy of a CID on a partnership, corporation, or other legal entity can be made by mail (registered or certified, return receipt requested), by delivery to the principal office or place of business of the entity, or by delivery to any partner, executive officer, managing agent, general agent, or agent authorized by law to accept service of process. Individuals may be served with an executed copy of a CID by mail (registered or certified, return receipt requested) or in person. Within the United States, service may be made by any United States Marshal or Deputy Marshal or by any "antitrust investigator." The latter term is defined to mean an attorney or investigator employed by the Department of Justice and engaged in antitrust enforcement activity. 15 U.S.C. § 1311(e). This description includes paralegals.

As a general practice, CIDs are served within the United States by registered or certified mail. Proof of service of a CID is verified by the return post office receipt which demonstrates delivery of the CID. The return receipts should be retained with the staff copies of the CIDs in the event that proof of service is required at a later time. Where an individual serves the CID, proof of service is made by a verified return by that individual setting forth the manner in which service was made.

Service on individuals or companies not found within the United States is made in the manner that the Federal Rules of Civil Procedure prescribe for service in a foreign country. Service on a foreign national or foreign company should not be attempted without first notifying the Foreign Commerce Section. See Antitrust Division Directive ATR 3300.2 and Chapter VII, Section IV, *infra*.

E. CID Custodians and Deputy Custodians

The Act imposes obligations on the Division with regard to the confidential treatment of CID information (see Section G, *infra*), the manner in which CID information may be used during an investigation and any subsequent court proceedings (see Section H, *infra*), and the return of original documentary material obtained by CID after the completion of an investigation or any proceedings arising out of the investigation (*see* Section H, *infra*). To insure that these obligations are met, the Act requires that the Assistant Attorney General designate an antitrust investigator to serve as custodian of documentary material, answers to interrogatories, and transcripts of oral testimony received under the Act. 15 U.S.C. § 1313(a). The statute also provides that the Assistant Attorney General may appoint additional antitrust investigators to assist the custodian by serving as deputy custodians. The term "custodian" is defined to mean the custodian or any deputy custodian designated by the Assistant Attorney General. Thus, a deputy custodian has the same statutory authority as a custodian. 15 U.S.C. § 1311(h).

When a CID is issued, the general practice is to appoint the Chief of the requesting section or field office as the custodian and one or two of the trial attorneys on the investigative staff to serve as deputy custodians. In the event of the death, disability, separation from government service, or official relief of a custodian, the Assistant Attorney General is required to designate another antitrust investigator to serve as a successor custodian and to notify the CID respondent of this designation. 15 U.S.C. § 1313(f).

F. Types of Civil Investigative Demands

1. CIDs for Documentary Material

A Documentary CID must state the nature of the conduct being investigated, describe the documents sought with "such definiteness and certainty as to permit such materials to be fairly identified," prescribe a reasonable return date or dates, and identify the custodian to whom the documentary material shall be made available. 15 U.S.C. § 1312(b)(1) and (2). What constitutes an adequate description of the conduct being investigated is discussed in Section I, *infra*.

The civil discovery standards and the standards applicable to grand jury subpoenas *duces tecum* are applied to determine whether the description of documents sought meets the statutory standard and whether the return date is a reasonable one. The statute contemplates that a CID for documents may have a staggered return date, requiring that certain classes of documents be produced for inspection and copying at an earlier date than others. This is useful where documentary CIDs seek different categories of documents, some of which are readily available while others require a more detailed search to locate and assemble.

Under the Act, when a CID for documents is served, the recipient is obligated to produce the documentary material for inspection and copying or reproduction by the government at the principal place of business of the recipient or at such other place as the custodian and the recipient may agree in writing or as the court may direct pursuant to 15 U.S.C. § 1314(d). 15 U.S.C. § 1313(b). The recipient of a CID for documents is required to produce the originals for inspection and copying unless the recipient and the custodian enter into a written agreement allowing the substitution of copies for originals of all or any part of the requested documents. 15 U.S.C. § 1313(b). When the documents produced are in such a condition that satisfactory copying or reproduction cannot be done, the CID recipient is required to surrender the original documents to the government. 15 U.S.C. § 1314(a). The production of documentary material in response to a CID must be accompanied by a certificate of compliance in the form designated on the back of Form ATR 154, certifying the adequacy of the document search. 15 U.S.C. § 1312(g).

In practice, the CID recipient usually mails copies of the requested documents to the Division rather than having Division attorneys go through the process of inspecting and copying the materials designated as responsive to the CID. When the recipient copies the documents and provides them to the Division, the Division will reimburse the recipient for the reasonable cost of reproduction of the documents. The rate of reimbursement per copied page is the standard rate that the Division pays for outside copying services and must be approved by the Executive Office. (For reference to the use of the Information Systems Support Group in this area, see Chapter VI, Section II).

On occasion, recipients of documentary CIDs request that they be reimbursed for the cost of the document search. The Division is not authorized by law to reimburse persons for such costs; consequently, Division attorneys should not enter into any agreements with regard to reimbursement for the cost of document searches.

2. CIDs for Answers to Written Interrogatories

The Act requires that a CID for answers to written interrogatories state with "definiteness and certainty" the questions to be answered, prescribe a date or dates at which time answers to the interrogatories shall be submitted, and identify the custodian to whom the answers shall be submitted.

As with documentary CIDs, the statute provides that there can be a phased response to an interrogatory CID with certain questions being answered earlier than others. 15 U.S.C. § 1312(b)(3). Answers to CID interrogatories must be accompanied by a certificate of compliance in the form designated on the back of Form ATR 156.

3. CIDs for Oral Testimony

A CID for oral testimony must state the date, time and place where the testimony will be taken, identify an antitrust investigator who will conduct the examination, and identify a custodian for the transcript of the examination. 6/ The statute provides that testimony may be taken in the federal judicial district where the witness resides, is found, or transacts business, or in any other place agreed upon by the Division and the deponent. 15 U.S.C. § 1312(i)(3). The general practice is to conduct the deposition at an office of either the Division or the U.S. Attorney for the District in which the deposition is being taken.

The deposition must be taken before an officer authorized to administer oaths and affirmations, and the testimony must be taken stenographically and transcribed. 15 U.S.C. § 1312(i)(1). The usual practice is to have the stenographer who records the testimony serve as the officer administering the oath or affirmation. See Division Directive ATR 2570.1 "Utilization of Court Reporting Services."

After the testimony is transcribed, the witness, who may be accompanied by counsel, must be afforded a reasonable opportunity to examine the transcript, unless such examination is waived by the witness. Any changes in form or substance that the witness desires to make are to be entered and identified upon the transcript by the officer/stenographer or antitrust investigator, together with a statement of the

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6/ 15 U.S.C. § 1312(b)(4)(B) requires that only one antitrust investigator be designated on the face of the CID as an antitrust investigator who shall conduct the examination; however, 15 U.S.C. § 1312(i)(2) makes clear that more than one antitrust investigator can be present at a CID deposition. This point was also made by Senator Hart in the Senate debates on the Antitrust Improvements Act where he stated that "the oral examination is to be conducted by the antitrust investigator (accompanied by any assistants he may need)." Congressional Record, Daily Ed., Sept. 8, 1976, S. 15416.

reasons given by the witness for making these changes. The transcript is then to be signed by the witness unless the witness waives signature in writing, is ill, cannot be found, or refuses to sign. If the transcript is not signed by the witness within 30 days of his being afforded a reasonable opportunity to examine it, the officer/stenographer or antitrust investigator is authorized to sign it and state on the record the fact of the waiver, illness, absence of the witness, or the refusal to sign, together with the reason, if any, given for the refusal. The transcript must contain a certificate of the officer to the effect that the witness was duly sworn by him and that the transcript is a true record of the testimony given by the witness. 7/

The Act provides substantial safeguards to protect the interests of the CID deponent. The deposition is closed to the public. Only the person testifying, his counsel, the antitrust investigators conducting the deposition, the officer before whom the testimony is to be taken, and any stenographer taking the testimony may be present. The statute explicitly provides that the "Publicity In Taking Evidence Act" does not apply to CID depositions. 15 U.S.C. § 1312(i)(2).

A CID deponent may be accompanied, represented, and advised by counsel at the deposition. 15 U.S.C. § 1312(i)(7)(A). Counsel may advise the witness, in confidence, either upon the request of the witness or upon the counsel's own initiative with respect to any question asked of the witness. The witness or counsel may object on the record to a question and briefly state the reason for the objection. The Act provides that an objection may properly be made, received, and entered upon the record when it is claimed that the witness is entitled to refuse to answer the question on grounds of any constitutional or other legal right or privilege, including the privilege against self-incrimination, which is discussed infra. The statute provides that there is no other ground for refusing to answer a question or for interrupting the oral examination. 15 U.S.C. § 1312(i)(7)(A);

7/ A CID deponent is entitled to the same fees and mileage as are paid to witnesses in U.S. district courts. 15 U.S.C. § 1312(i)(8). Payment should be arranged through the U.S. Marshal's Office or the U.S. Attorney in the district where the deposition is being taken. Division attorneys should consult with the U.S. Attorney's Office to determine the local practice.

2 TRADE REG. REP. (CCH) ¶ 8595 at 14, 113. If the witness refuses to answer a question, the antitrust investigator conducting the examination may petition the district court, pursuant to 15 U.S.C. § 1314, for an order compelling the witness to answer. *See* Section J, *infra*, for a discussion of judicial enforcement.

As in a grand jury or court proceeding, a CID deponent may refuse to respond to a question on the basis of the privilege against self-incrimination. If the privilege is raised, the deponent may then be compelled to testify pursuant to the immunity statute, 18 U.S.C. § 6001 *et seq*. A deposition taken pursuant to CID is a proceeding before an agency of the United States as contemplated in 18 U.S.C. § 6002; consequently, the Department of Justice may compel the testimony of the deponent in accordance with 18 U.S.C. § 6004. The latter section permits a governmental agency to issue an order compelling the testimony of an individual in an agency proceeding providing it has the approval of the Attorney General and determines that the prospective testimony is necessary to the public interest and will otherwise be withheld under a Fifth Amendment claim. The authority of the Department of Justice to issue a compulsion order in connection with a CID deposition has been specifically delegated to the Assistant Attorney General. 28 C.F.R. § 0.175(c).

As an additional safeguard, a CID deponent is entitled to a copy of his testimony upon payment of a reasonable charge. However, the Act provides that the Assistant Attorney General for good cause may limit a witness to the inspection of the official transcript of the testimony, thereby denying the witness a copy of the transcript. The legislative history indicates that the "good cause" test is identical to the transcript access provisions of the Administrative Procedure Act, 5 U.S.C. § 555(c). The legislative history also indicates that Congress anticipated that CID witnesses would routinely receive a copy of their transcript, except in investigations where there existed the possibility of witness intimidation, economic reprisal, or the "programmed" formulation of a common defense by possible co-conspirators through the tailoring of their testimony to match the evidence held by the government. [8]

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[8] H.R. Rep. No. 94-1343, note 1, at 2609.

G. Confidentiality of CID Materials

Documents, answers to interrogatories, and transcripts of oral testimony obtained pursuant to CID are exempt by 15 U.S.C. § 1314(f) from disclosure under the Freedom of Information Act and cannot be disclosed, except as provided by the statute, to any individual other than an authorized official or employee of the Department of Justice without the consent of the person who produced the material, answers, or transcripts. 15 U.S.C. § 1313(c)(3). The circumstances under which CID materials may be disclosed in connection with grand jury, court, or agency proceedings are described in Section H, infra.

The Act permits CID material to be used by the Division in connection with the taking of oral testimony pursuant to CID. 15 U.S.C. § 1313(c)(2). In Aluminum Company of America v. U.S. Department of Justice, 444 F. Supp. 1342 (D.D.C. 1978), the issue was raised as to whether a CID recipient could obtain a protective order that imposed conditions upon the Division concerning the use of CID documents at oral depositions of third parties. The court held that it was within the power of the district court to issue a protective order to limit disclosure of confidential information obtained by the Division through the production of documents in response to a CID. Under the terms of the protective order issued by the court, the CID recipient was required to designate which documents were considered confidential, and the court provided that if the government intended to disclose any of these documents to third parties in the course of depositions, the government must provide the recipient with notice prior to disclosure and indicate the classification of third party to whom disclosure would be made, e.g., competitor or customer. The protective order provided for objections by the CID recipient and for resolution of the objections by the court, if the Division and the recipient were unable to reach agreement. The Aluminum opinion has been followed by the Second Circuit in U.S. v. GAF Corporation, 596 F.2d 10 (2d Cir. 1979).

As described in Section H, infra, the Division may turn over CID materials to the Federal Trade Commission or the Congress. On several occasions, CID recipients have attempted to obtain a commitment that the Division would refuse to disclose to the Congress or to the FTC material produced pursuant to CIDs. Such a commitment will not be made by the Division. However, the Division has been willing to agree to give notice to a CID recipient before disclosing CID material to the Congress or the Federal Trade Commission.

If a civil action is commenced based on information obtained by CID, the defendants in that action may invoke their full discovery rights under the Federal Rules of Civil Procedure and obtain CID information relevant to their defense. The House Report on the 1976 amendments to the Act noted that the defendants will thus be able fully to protect their rights at trial by interrogating, cross examining, and impeaching CID witnesses. However, the House Report noted that the scope of civil discovery is not unlimited and that the court has broad discretion under the Federal Rules to set limits and conditions on discovery, such as by issuing a protective order. 9/

H. Use of CID Materials

CID materials may be used by Department of Justice personnel in the performance of their duties and may be disclosed to persons other than the person who produced the material only in connection with CID depositions or a court, grand jury, or federal administrative proceeding. 10/ Copies of CID materials may be made for the official use of Department of Justice personnel. 15 U.S.C. § 1313(c)(2). Regulations governing the use of CID material by Department of Justice personnel are set out in 28 C.F.R. Part 49. When the custodian delivers CID material to an attorney for use in connection with a court, grand jury, or federal administrative proceeding, the attorney is responsible, upon the completion of the proceeding, for returning to the custodian any material that has not passed into the control of the court, grand jury, or agency. 15 U.S.C. § 1313(d)(1).

The custodian is authorized to deliver to the Federal Trade Commission, in response to a written request, copies of CID material for use in connection with an investigation or proceeding under the Commission's jurisdiction. CID materials furnished to the Commission may only be used by the Commission in such manner and subject to such conditions

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9/ H.R. Rep. No. 94-1343, *supra* note 1, at 2610.

10/ *See* Section G, *supra*, for a discussion of protective orders that may be entered in connection with the possible disclosure of CID material at CID depositions or other proceedings.

as apply to the Department of Justice. The Division has discretionary power to either deliver or withhold CID materials requested by the FTC. 15 U.S.C. § 1313(d)(2). The Act also provides that the restrictions on use of CID materials are not intended to prevent disclosure of CID materials to either body of the Congress or to any authorized committee or subcommittee of the Congress. 15 U.S.C. § 1313(c)(3). For a discussion of Division practice in connection with the delivery of CID materials to the FTC or the Congress, see Section G, supra.

At the close of an investigation or of any case or proceeding arising out of an investigation, the custodian is required, upon written request of a person who produced documentary material under CID, to return to that person any original documentary material that has not passed into the control of any court, grand jury, or agency. The Division is required to return only original documents.

Where the Division has made copies or is furnished with copies of documentary material pursuant to 15 U.S.C. § 1313(b) and (c)(2), the copies do not have to be returned to the person who produced the documents. 11/ See Division Directive ATR 2710.1 "Maintenance, Destruction and Removal of Antitrust Division Documents."

I. Grounds for Objections to CIDs

The Act provides that no CID shall require the production of any documentary material, the submission of any answers to written interrogatories, or the giving of any oral testimony that would be protected from disclosure under the standards applicable to grand jury subpoenas or the standards applicable to discovery requests under the Federal Rules of Civil Procedure, to the extent that the application of the civil procedure standards is appropriate and consistent with the provisions and purposes of the Act. 15 U.S.C. § 1312(c).

11/ H.R. Rep. No. 94-1343, supra note 1, at 2610 (n.41).

The civil discovery standards that Congress viewed as "appropriate and consistent" with the Act are described in the legislative history of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, which added the civil discovery standards to the existing grand jury standard of protection. This legislative history emphasizes that, given the broader scope and less precise nature of investigations, care must be taken to avoid the rigid application of post-complaint civil discovery standards to CIDs. The House Report on the 1976 amendments also stressed that the purpose of the Antitrust Improvements Act was to increase the effectiveness of antitrust investigations and that the application of the civil discovery standards must be consistent with this purpose. 12/

In the Senate debate, Senator Hart explained the intention behind applying the civil discovery standards to CIDs:

> We included the House language in the Byrd motion because the qualification in that language limited the application of discovery standards in the FRCP to those that are appropriate and consistent with the purposes of the Act. This important qualification provides assurances that unreasonable constraints will not be applied to the Department's investigations. See H. Rep. 94-1343, at 9-13. We view the FRCP standard as essentially incorporating the "oppressive" and "burdensome" standards of Rule 26(c). So limited, this standard is consistent with the purposes underlying the Act and would not breed unnecessary litigation by persons seeking to thwart civil antitrust investigations. 13/

12/ H.R. Rep. No. 94-1343, supra note 1, at 2606. The House Report specifically cited one category of discovery objections permitted under the Federal Rules of Civil Procedure that may not be raised against a CID: objections based not on the burdensome or irrelevant nature of the CID but instead on the various procedural requirements of the civil rules, such as rights of notification, intervention, confrontation, and cross examination. Id. at 2606-2607.

13/ Congressional Record, Daily Ed., Sept. 8, 1976, S. 15416.

Senator Hart then outlined what factors should be taken into account in deciding which civil discovery grounds are "appropriate and consistent" for application to CIDs:

> More specifically, in deciding which grounds are in fact "appropriate and consistent" for application to CIDs, the following factors are important and should be taken into account:
> (1) Investigations -- unlike pre-trial discovery and litigation -- are not adversary or adjudicatory;
> (2) Pre-trial discovery and litigation have different purposes, a narrower scope, and more clearly-defined issues than investigations have;
> (3) Parties to pre-trial discovery and litigation are clearly identified, while there are no parties in investigations -- possible antitrust wrongdoers are seldom firmly identified until way late in the investigation;
> (4) Parties in pre-trial discovery and litigation have certain rights with respect to notification, participation, intervention, confrontation, and cross examination, whereas there are no such rights (even for targets) in investigations;
> (5) Narrow, technical, or merely procedural objections which frustrate expenditious [sic] civil antitrust investigations are normally not "appropriate and consistent;"
> (6) Relevance in an investigation may be different from relevance in pre-trial discovery of [sic] litigation -- once litigation is begun, the interests and scope of the matter tend to be much more specific and refined than in investigations; and
> (7) Civil antitrust investigations are nonetheless investigations, and they are in most respects close [sic] to grand jury investigations than they are to pre-trial discovery or litigation. 14/

14/ Id.

The standards applicable to grand jury subpoenas and to discovery requests under the Federal Rules of Civil Procedure are comprehensively analyzed in the authorities cited in the footnote. 15/ There is little precedent under the Act concerning the application of these standards to CIDs, since there are only a few cases in which objections of this nature have been raised. See, e.g., Material Handling Institute, Inc. v. McLaren, 426 F.2d 90, 92-93 (3d Cir. 1970) (Relevancy and discovery of records maintained in non-documentary form); Sterling Drug, Inc. v. Clark, 1968 Trade Cas. ¶72,629 (S.D. N.Y. 1968) (CID requiring second search of company files not unduly burdensome); and Petition of Columbia Broadcasting System, Inc., 235 F. Supp. 684, 688 (S.D.N.Y. 1964) (Reasonableness of demand).

In addition to objections under the grand jury and civil discovery standards, CID recipients, of course, can object on grounds of failure to comply with the procedures and requirements of the Act. For example, the Act requires that each CID state the nature of the conduct, activity, or proposed action that is under investigation and the provision of law that is applicable to the investigation. 15 U.S.C. § 1312(b). On several occasions, CID recipients have challenged the adequacy of the description of the nature of the investigation. In the first case in which this challenge was made, Petition of Gold Bond Stamp Company, 221 F. Supp. 391, 397 (D.Minn. 1963), aff'd per curiam, 325 F.2d 1018 (8th Cir. 1964), the court, in overruling the motion to quash, noted that in considering the sufficiency of the description of the conduct under investigation it was necessary to remember that the Act was designed (1) to enable the Attorney General to determine whether there was a violation of the antitrust laws, and if so, (2) to enable the Attorney General properly to allege the violation in a civil complaint. From this the court concluded:

15/ U.S. Department of Justice, ANTITRUST GRAND JURY PRACTICE MANUAL (CCH, 1975); C. Wright, 1 FEDERAL PRACTICE AND PROCEDURE: CRIMINAL, § 275; Wright & Miller, FEDERAL PRACTICE AND PROCEDURE: CIVIL (Rules 26, 34, and 45); 8 MOORE's FEDERAL PRACTICE -- CRIMINAL RULES, ¶17.11; MOORE'S FEDERAL PRACTICE -- CIVIL RULES (Rules 26, 34, and 45).

> Necessarily, therefore, the nature of the conduct [under investigation] must be stated in general terms. To insist upon too much specificity with regard to the requirement of this section would defeat the purpose of the Act, and an overly strict interpretation of this section would only breed litigation and encourage everyone investigated to challenge the sufficiency of the notice. 221 F. Supp. at 397.

Subsequent to the Gold Bond decision, only four CIDs have been challenged because of alleged inadequacies in the description of the investigation. In each instance, the Gold Bond decision was followed and the descriptions were found to be satisfactory. 16/ Lightning Rod Manufacturers Association v. Staal, 339 F.2d 346, 347 (7th Cir. 1964); Hyster Company v. United States, 338 F.2d 183 (9th Cir. 1964); Material Handling Institute, Inc. v. McLaren, supra at 92; and Petition of Emprise Corporation, 344 F. Supp. 319, 322-323 (W.D.N.Y. 1972). The language found to have adequately described the nature of the investigations in these cases and in the Gold Bond case is set out in the footnote. 17/

16/ In the course of the debates on the 1976 amendments to the Act, Chairman Rodino stated that the intention of the compromise bill was to carry forward the Gold Bond standard as it had evolved under the 1962 Act. Congressional Record, Daily Ed., Sept. 16, 1976, H.R. 10292.

17/ Petition of Gold Bond Stamp Company, supra at 397 ("Restrictive practices and acquisitions involving the dispensing, supplying, sale or furnishing of trading stamps and the purchase and sale of goods and services in connection therewith."); Lightning Rod Manufacturers Association v. Staal, supra at 347 ("Conspiracy to restrain trade by fixing the prices of lightning protection systems and components thereof and by conspiring to refuse to deal with a purchaser of components thereof; conspiracy to monopolize by agreeing to exclude a seller of lightning protection systems from the

As with other types of discovery, CIDs may be quashed if they are not issued in good faith. While a presumption of regularity applies to the issuance of CIDs, Hyster Co. v. United States, supra at 187; Lightning Rod Manufacturers Association v. Staal, supra at 347, it has been held that a CID may be quashed if it is issued for the purpose of intimidating or harassing the recipient, Chattanooga Pharmaceutical Ass'n. v. U.S. Department of Justice, 358 F.2d 864 (6th Cir. 1966), and it has been suggested that a similar result should follow if a CID is issued in response to outside political interference and pressure or to pay off a political debt and not in a *bona fide* attempt to determine whether or not a violation occurred. Petition of The Cleveland Trust Co., 1972 Trade Cas. ¶73,991 at 92,122 (N.D. Ohio 1969). 18/

17/ [Footnote Cont'd.]

sale thereof."); Hyster Company v. United States, *supra* at 184 ("Concerted action with manufacturers of tractor equipment, accessories and parts to control production and distribution, and restrictions upon pricing and distribution of those products."); Petition of Emprise Corporation, *supra* at 322 ("The use by Emprise Corporation or its subsidiaries or affiliates of lending power or other collateral inducements to obtain concession rights at sports arenas with the effect of foreclosing its competitors from a substantial volume of interstate commerce."); and Material Handling Institute, Inc. v. McLaren, *supra* at 92 (The statement that the Division was investigating a possible violation of Section 1 of the Sherman Act by a "contract or combination in unreasonable restraint of trade" was found to be adequate, based on correspondence and conversations between the government and the recipient prior to issuance of the CID.).

18/ But, *see* United States v. Cotton Valley Operators Comm., 75 F. Supp. 1, 6 (W.D. La. 1948) where the court held that evidence that an antitrust suit was induced by political considerations and to pay a political debt was irrelevant because if the evidence supported the government's allegations the court could not decline to award judgment to it even though the case may have been politically motivated.

In Chattanooga Pharmaceutical Ass'n. v. U.S. Department of Justice, supra, the government declined to answer the CID recipient's allegations that the government had issued the CID for the purpose of intimidating and harassing the recipient into terminating a pending suit for enforcement of a state fair trade act. Since the government did not respond to the allegations, the court considered them to stand admitted and set aside the CID. Subsequently, in American Pharmaceutical Ass'n. v. U.S. Department of Justice, 344 F. Supp. 9 (E.D. Mich. 1971), aff'd, 467 F.2d 1290 (6th Cir. 1972), similar charges were made that the CIDs were issued for the purpose of harassing the recipients. However, the motions to set aside the CIDs were denied when the Assistant Attorney General filed an affidavit stating why the CIDs were issued and denying that they were issued with the intent or purpose of harassing or bringing duress on the recipients. Since there was no evidence that refuted the Assistant Attorney General's affidavit, the motions to quash the CIDs were denied. A similar result was reached in Petition of Emprise Corporation, supra, where the CID recipients charged improper motives on the part of the government and the Acting Assistant Attorney General responded by affidavit denying the charges. 19/

On occasion, the government has sought documents by CID that were produced in the course of private litigation under a protective order. The question of whether this could be done pursuant to CID authority was raised in United States v. GAF Corporation, 449 F. Supp. 351 (S.D.N.Y. 1978), rev'd and remanded, 596 F.2d 10 (2d Cir. 1979). In GAF, the Division issued a CID to obtain from GAF, a private antitrust plaintiff, documents that GAF had received pursuant to discovery proceedings in a private action against Kodak, together with a memorandum prepared by GAF's attorneys analyzing the documents. GAF's attorneys did not raise the work product privilege with regard to the requested documents.

19/ In the Emprise case, the petitioner sought, as an alternative to quashing the CID, to be permitted to address interrogatories to the Antitrust Division to determine whether or not an improper purpose existed. The court concluded that the question of improper motives had been answered by the affidavit and that the interrogatories were therefore neither necessary nor appropriate. In so holding, the court distinguished Petition of The Cleveland Trust Co., supra, where a CID recipient was permitted to address limited interrogatories to the Division seeking the identity of the persons who worked on the preparation of the CID and who participated in the decision to issue the demand.

The court concluded that these documents could be obtained by CID, but the court indicated that when documents are sought by CID from one party to litigation that were produced pursuant to protective order from another party to the litigation, the original producer of the documents would be considered to be the person who produced the documentary material under the statute and thus the person entitled to the protections accorded to CID recipients under the Act.

J. Judicial Proceedings to Enforce or Quash CIDs

If a recipient objects to a CID, the recipient has two options: he may refuse to respond to the CID or he may choose to file a petition to quash the CID. 20/ If the recipient follows the first option, the Division must petition for enforcement of the CID if the Division wishes to pursue the matter. If the recipient chooses to follow the second option, a petition for an order modifying or setting aside the CID must be filed within the time periods specified in 15 U.S.C. § 1314(b). A petition for an order modifying or setting aside a CID must be filed within 20 days after the petition is served or at any time before the specified return date, whichever period is shorter. The time allowed for compliance does not run during the pendency of a petition. The proper venue for a petition is the judicial district within which the recipient resides, is found, or transacts business. 15 U.S.C. § 1314(b).

When a recipient fails to comply with a CID, the Division may petition for enforcement of the CID in any judicial district in which the recipient resides, is found, or transacts business. A petition for enforcement should be captioned United States of America, petitioner v. (Name of CID Recipient), respondent. The petition should be supported by a memorandum setting forth the factual and legal basis for enforcement of the CID. The CID recipient must be served with a copy of the petition. The manner of service is as provided in the Federal Rules of Civil Procedure. 21/

20/ If a recipient objects to only part of a CID, he must comply with the unobjectionable parts. H.R. Rep. No. 94-1344, *supra* note 1, at 2608.

21/ The Federal Rules of Civil Procedure apply to petitions filed for enforcement or quashing of a CID, to the extent that such rules may have application and are not inconsistent with the provisions of the Act. 15 U.S.C. § 1314(e).

Any final order entered by the court upon a petition for enforcement or quashing of a CID is subject to appeal pursuant to 28 U.S.C. § 1291. Contempt of court sanctions are authorized for disobedience to a court order enforcing a CID. 15 U.S.C. § 1314(d).

K. Criminal Penalties

Where there is reason to believe that a CID recipient has withheld documents or information or has in any other way attempted to evade, avoid or obstruct compliance with a CID, an investigation should be initiated to determine whether there has been a violation of 18 U.S.C. § 1505. [22] This statute makes it a criminal offense to intentionally withhold, misrepresent, conceal, destroy, alter, or falsify any documentary material, answers to written interrogatories or oral testimony which is the subject of a CID. Authority to conduct an obstruction of justice investigation, including authority to investigate by grand jury, is obtained by following the standard procedures for requesting preliminary inquiry and grand jury authority. Under 28 C.F.R. § 0.179a, matters involving obstruction of justice are under the supervisory jurisdiction of the Division having responsibility of the case or matter in which the alleged obstruction occurred. However, the regulations provide that, in order to determine the appropriate supervisory jurisdiction, there should be consultation by the Division with the Criminal Division prior to the initiation of an obstruction of justice grand jury investigation or enforcement proceeding. *See* Section VI(J), *infra*.

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[22] The text of the statute is found at II-61--II-62, *supra*.

VI. Conducting A Grand Jury Investigation

The *Grand Jury Manual for the Antitrust Division*, issued in 1974, is a comprehensive analysis of the Division's grand jury practice and procedure. Because the *Grand Jury Manual* sets out in detail the procedures and policy involved in conducting a grand jury investigation, this section will endeavor to set forth various considerations in determining whether a grand jury should be conducted, a checklist of useful practices, and policy changes relating to the conduct of a grand jury that have been established since the *Grand Jury Manual* was issued.

A. Requesting A Grand Jury Investigation

Consistent with the standards developed in Section III of this Chapter on whether to proceed by criminal or civil investigation, a staff should consider carefully the probability that a criminal violation of the antitrust laws has occurred. In requesting a grand jury investigation, the staff attorneys should prepare a memorandum detailing the results of the preliminary inquiry, the information obtained from an informant or from a CID investigation. The request for grand jury authority should specify, to the extent possible, (a) the companies, individuals, industry and commodity involved in the investigation; (b) the estimated amount of commerce involved on an *annual* basis; (c) the geographic area involved; (d) the estimated amount of time that will be utilized by the staff; (e) a determination of the district where the investigation is to be conducted; and (f) a summary, to the extent possible, of all evidence that has been developed during the course of the preliminary inquiry or other investigation. Generally speaking, the length of the grand jury request memorandum depends upon the complexity of the facts and the amount of material that the staff has developed in its investigation.

The grand jury request memorandum should be forwarded to the section or field office Chief for review. The Chief will write a cover memorandum setting forth his or her views of the investigation, a recommendation, and a list of attorneys who will be assigned to such investigation. The Chief should also set forth an estimate of the amount of time and resources that the investigation will take and any specific problems likely to be encountered during the investigation. The Chief should also attach either the ACES Report of New Matter (ATR-132) or the ACES Matter Update Report (ATR-133), indicating the proposed opening date of the investigation, the resources required and the target completion date. *See* Division Directive ATR 2810.1(4)(c).

The grand jury request memorandum and the Chief's cover memorandum are sent to the Office of Operations and reviewed by the Director of Operations. Operations then prepares a memorandum recommending or not recommending the grand jury investigation. The recommendations are then sent to the appropriate Deputy Assistant Attorney General, who comments upon them, and, finally, to the Assistant Attorney General, who approves or disapproves the request.

Upon approval by the Assistant Attorney General, letters of authority 1/ are issued for all attorneys who will take part in the grand jury investigation. 2/ At that time the staff should make appropriate arrangements to arrange grand jury sessions in the district where the grand jury will sit. Such arrangements may be made with the U.S. Attorney in the District, usually after consultation with the field office Chief with jurisdiction over that area.

1. Venue Considerations

In determining where to conduct the grand jury, the staff should consider the following factors:

(a) The area or the region in which the violation occurred or in which the proposed targets of the investigation are found and do business.

(b) Judicial districts where there is a substantial availability of grand jury time and considerable use of grand juries. This will eliminate any problem of conducting the grand jury in a district where the jury will only meet for one day each month or one day quarterly, as is the practice in several districts in the United States.

1/ These letters of authority may be filed with the Clerk in the District where the jury will sit. Oaths of office generally are no longer executed.

2/ Under Rule 6(e)(2)(B), the attorneys for the Government are required to provide the court with the names of persons to whom the grand jury materials have been disclosed (paralegals, economists, etc.). The Division will follow the practice of the local U.S. Attorney in preparing this information for the court.

(c) If the grand jury is being conducted by a Washington section, the Chief, or one of the attorneys on the staff, should confer with the Chief of the field office with jurisdiction over the area where the grand jury will be conducted. The field office Chief will be aware of the problems of conducting grand juries in certain districts and the time difficulties that may exist. The Chief should also be aware of other antitrust grand juries in the District.

(d) The staff, either directly or with the field office Chief, should meet with the U.S. Attorney or the Assistant U.S. Attorney in the district responsible for arranging grand jury sessions. The U.S. Attorney will know the judges and court personnel and will be knowledgeable of local procedures. Where possible, it is most appropriate to make these arrangements with court personnel and U.S. Attorney in person and to establish a working relationship with these individuals from the very beginning of the investigation.

B. Empaneling The Grand Jury

Among the first decisions the staff must make after authority is granted is whether to request empanelment of a new grand jury or to use an existing grand jury. Attorneys should attempt to estimate the number of sessions and the amount of time necessary to complete the investigation so that arrangements may be made to either use an existing grand jury or request the empaneling of a new grand jury. Where the investigation is likely to take a considerable number of sessions and substantial amount of grand jury time, it is best to begin a new 18-month grand jury that will be empaneled specifically for antitrust investigations. When that is the case, the Division can maintain better use and control over the scheduling and efficient use of grand jury time.

In empaneling the grand jury, the procedures and policies set forth in the Grand Jury Manual at pages 15-34 should be consulted. Close liaison with the Clerk's office, the Court and the U.S. Attorney are especially necessary in mastering the mechanics of local procedures involving grand jury empanelment.

Rule 6(e) of the Federal Rules of Criminal Procedure also requires full recordation of all proceedings before the grand jury. As to this rule and others, Division attorneys should follow the procedures that have been set up in the district in which the grand jury will sit. Since such procedures vary from district to district, the staff should become familiar with local procedures through establishing good liaison relationships with the United States Attorney, the Clerk of the Court, and the United States Marshal.

C. Obtaining An Impounding Order

In most cases, it will be necessary for Division attorneys to remove documents from the grand jury room and take them back to their offices for study and review. In such cases, an impounding order must be filed at the beginning of grand jury proceedings. The *Grand Jury Manual* at 122-130 is particularly helpful on this issue.

A typical impounding order may be found by consulting the Division's Exemplar File Item No. 155.

D. Issuing Grand Jury Subpoenas

The grand jury may wish to issue subpoenas *duces tecum* and subpoenas *ad testificandum* during the course of the proceedings. Both types of subpoenas are discussed at length in the *Grand Jury Manual*; however, certain additional matters should be considered.

1. Subpoenas Duces Tecum

Subpoenas *duces tecum* generally are issued to corporate entities and individuals requiring the submission of various types of documentary materials to the grand jury. The subpoena return date should provide a sufficient period of time for a document search and be set on a date when the grand jury will be sitting within the District. The powers of the grand jury to issue such subpoenas are described at 36-39 of the *Grand Jury Manual*.

The schedule of documents to be attached to a subpoena *duces tecum* should include those documents necessary to a full investigation of the conduct in question. Such schedules should be carefully drawn, based on the techniques described at 76 to 95 of the *Grand Jury Manual*. Before issuing the subpoenas, the schedules should be carefully reviewed by the section or field office Chief or Assistant Chief to ensure their completeness and to ensure against burdensomeness or other grounds for possible motions to quash.

Once the subpoena is issued, the staff may negotiate the specific provisions of the schedule with counsel for the recipient. In many cases, counsel for the recipient may state that they will move to quash if a certain provision is not eliminated or limited. It is the policy and practice of the Antitrust Division to vigorously defend its subpoenas against motions to quash. Various attacks on grand jury subpoenas _duces tecum_ are described in the _Grand Jury Manual_ at 96 to 109, and representative responses to motions to quash are found in the Exemplar File at Exemplars Number 19, 35 and 36.

In general, negotiations relating to subpoenas _duces tecum_ are resolved short of litigation; however, if litigation is necessary, staff should endeavor to file all papers under seal and conduct the proceedings in chambers to prevent any breach of grand jury secrecy.

2. Subpoenas Ad Testificandum

Subpoenas _ad testificandum_ are issued to individuals for their testimony in a particular situation. Since the publication of the _Grand Jury Manual_ in 1974, the Department of Justice has issued guidelines on who may be subpoenaed before the grand jury and the steps that need to be taken in the application of these procedures. _See_ USAM 9-11.251. At the time that an individual is subpoenaed for appearance before the grand jury, the subpoena form should contain a statement of a witness' rights and obligations in appearing before the grand jury, unless the witness falls within the situation where the advice of rights is clearly superfluous. _See_ USAM 9-11.250. The following is the basic form that is attached to the subpoena by which an individual is advised of his rights in appearing before a federal grand jury.

Advice of Rights

1. The Grand Jury is conducting an investigation of possible violations of Federal criminal laws involving:

   (State here the general subject matter of the inquiry, _e.g._, conspiring to fix prices in widgets in violation of 15 U.S.C. §1)

2. You may refuse to answer any question if a truthful answer to the question would tend to incriminate you.

3. Anything that you do say may be used against you by the Grand Jury or in a subsequent legal proceeding.

4. If you have retained counsel, the Grand Jury will permit you a reasonable opportunity to step outside the grand jury room to consult with counsel if you so desire.

In addition to the notification given an individual when subpoenaed, when the witness appears before the grand jury, he or she should be made aware of the identity of the government attorneys, the nature of the grand jury process, the matter under investigation, and a statement of the witness' rights in appearing before the grand jury.

The following is suggestive of the type of statement that may be given at the very beginning of an individual's appearance before the grand jury. After the witness is asked his or her name and address, the attorney who is going to question that witness should make the following type statement or some variation thereof:

> "Mr./Ms. __________, my name is __________. I am a trial attorney with the Antitrust Division of the United States Department of Justice. Sitting to my right and left are _______________ and _______________ who are also trial attorneys with the Antitrust Division.
>
> Sitting before you are the members of a federal grand jury sitting in the District who are charged with responsibility under law for investigating allegations of criminal violations of the federal law. The proceeding in which you are appearing is an investigation of alleged antitrust violations involving ____________________ industry including the following types of activities _____________, _____________, and _______________.
>
> These grand jury proceedings are secret. There is a court reporter present, who is transcribing the testimony, but your testimony will remain secret and no one -- not the grand jurors or myself or any other attorneys for the United States -- are permitted to discuss any of the proceedings in this grand jury publicly. You, of course, are permitted to discuss these proceedings with your counsel or with anyone you wish.

However, you are not required to discuss these proceedings with anyone if you do not wish to do so.

The only way in which these proceedings could become public would be if, at some future time, a federal district judge should order under the provisions of Rule 6(e) of the Federal Rules of Criminal Procedure that the proceedings become public for use in some criminal prosecution or a matter related to such proceedings.

Under the Constitution of the United States, I will apprise you of certain rights that you have under the Bill of Rights.

First, you are not obliged to answer any question that you feel the answer to which may tend to incriminate you under the laws of the United States or this State. Do you understand that?

Second, any answer that you give to this grand jury might be used against you in a criminal proceeding at some future time. Do you understand that?

Third, any answer that you give that proves to be false may form the basis for charges against you of perjury or false statements before this grand jury. Do you understand that?

Finally, you have a right to counsel. Are you represented by counsel here today? What is your counsel's name?

Your counsel cannot be present with you here in the grand jury room. However, if you wish to consult with counsel you may indicate that to me at any time so we will take a short recess and permit you to leave the room and consult with counsel as is necessary. Do you understand that?

* * *

This suggested opening colloquy provides the witness with a full explanation of his or her rights and also establishes a clear statement of the witness's Fifth Amendment privilege and a threshold warning that any false statement may be prosecuted. A statement on the record that the individual is represented by counsel and the name of the counsel is also important and helpful in the event that any issue of proper representation arises at a later time.

E. Check List Of Procedures For A Grand Jury Session

These are suggested procedures for the preparation and conduct of a grand jury session. As indicated supra, the Division generally follows the procedures employed by the United States Attorney in a given district. This checklist suggests a series of practical matters that should be kept in mind during the grand jury sessions.

1. Procedures for setting up the session:

    a. Inform the Clerk's Office or U.S. Attorney of the timing of the session about one month in advance of the session, so that room arrangements may be made and the jurors are notified of the schedule.

    b. Arrange to obtain a court reporter at the time the session is scheduled and the jurors notified. See Division Directive ATR-2570.1, "Utilization of Court Reporting Services."

    c. Send subpoenas to the U.S. Marshal in the relevant district with a cover letter indicating the date of the testimony, the date by which service is required and other relevant information. Since Marshals in large metropolitan areas have a number of duties, the staff should give them as much lead time as possible to serve the subpoenas.

       When subpoenas duces tecum are sent to corporations or other entities, staff should allow sufficient time after service for document searches and retrieval. This requires more lead time than testimonial subpoenas.

d. Prepare immunity clearance requests for witnesses who may claim their Fifth Amendment privilege at the session. The immunity clearance papers (*see* Section F, *infra*) must be *received* in the Office of Operations at least two weeks before the date on which staff will need the clearance and immunity letter. The date that the staff needs the letter is the date that the U.S. Attorney will review the motion papers, or the date the judge will be asked to sign the order. The staff should also allow mailing time for receipt of the immunity letter and authorization, and should time itself accordingly.

2. Procedures to be checked the week before the session:

a. Check with the Clerk's Office to make sure that a quorum will be present at the grand jury session.

b. Check with the Clerk's Office to make sure that a foreman or deputy foreman will be present for the session.

c. Check that the grand jury room and the facilities of that room are prepared for the session.

d. Confirm that a court reporter will be present to record the session.

3. Matters to be checked immediately before the session begins:

a. Check that a Bible and a copy of the oath are available to swear in the witnesses.

b. Arrange for a room or a specifically designated place where the witness and counsel can confer with each other.

c. Check that there is some separation between witnesses if multiple witnesses are being called on the same day.

d. Arrange for adequate space for documentary materials that will be brought before the grand jury for the session. Arrangements of this kind can be made with the building manager and others to prevent inconvenience to the attorneys or to those delivering documents.

4. Procedures employed at the session:

   a. The Clerk's Office personnel or the secretary of the grand jury should check attendance to see that a quorum is present and recorded.

   b. The government attorneys and the foreman should check that no unauthorized persons are present in the room and that the doors are securely closed.

   c. The court reporter must be sworn in at the session if that reporter has not earlier transcribed proceedings in the investigation.

   d. The foreman or a government attorney should state on the record if a quorum is present at the opening of each session.

   e. At the first session of the investigation a government attorney may make a brief opening statement on the record describing the industry and the investigation to the jury.

   f. The witness is sworn in when he or she first comes into the room by either the foreman or stenographer, depending on practice in the district.

   g. If a witness is granted immunity, the immunity order should be provided to or read to the witness by the foreman or government attorney.

h. Since the grand jury is an officially constituted legal proceeding, the manner and tone of the prosecutors and the grand jurors' decorum should be identical to that which would take place in open court. Attorneys should conduct themselves as if a judge were presiding. Jurors should be advised not to read newspapers, books or other matter during sessions, nor should they be eating, drinking or talking during the proceedings.

i. The grand jurors should be given adequate breaks about every hour, or hour and a half, to assure their continued attention and provide for their personal convenience.

j. All exhibits presented to the witness during the proceedings should be premarked or marked by the stenographer and kept as part of the official proceedings with the transcripts. The stenographer should be prepared to number, date and initial the exhibits used and, if possible, index the exhibit references in the transcript.

k. During the course of the interrogation, either at specific breaks or at the end of the witness' testimony, the grand jurors may be invited to ask the witness questions. The procedure employed may be governed by local practice or by considerations of the government attorneys to make certain that the questions do not embarrass or harass the witness.

l. At the conclusion of the witness' appearance, the witness should complete the Witness Attendance Certificate, Form OBD-3, so that the witness may be compensated for travel costs.

F. Requests For Immunity

The Organized Crime Control Act of 1970 established the present statutory basis for granting use immunity to witnesses before a grand jury, at trial, and in other judicial proceedings. 18 U.S.C. § 6001 et seq. It is the policy of the Antitrust Division to use compulsion orders when granting immunity to witnesses before a grand jury. Only in special circumstances will the Antitrust Division use another procedure for obtaining immunity from prosecution for witnesses.

1. Division Procedures for Processing Immunity Requests

All immunity requests must be reviewed by the Director of Operations, the appropriate Deputy Assistant Attorney General and the Assistant Attorney General. Requests for immunity should be forwarded to the Office of Operations more than two weeks before the date that the staff wishes to have the authorization letter available for use, i.e., physically present in the staff's possession. This period of time is required by the Witness Records Unit of the Criminal Division to process the request through search of the Department's files. See U.S.A.M. 1-11.101, 1-11.120, and 1-11.130.

The staff should prepare four copies of Form OBD-111-A and submit them to the Office of Operations, together with a memorandum stating the status of the investigation and a detailed statement of the reasons why immunity is being requested for the witness. This memorandum should include the following information: (a) a statement of the witness' present position, and positions held during the period under investigation; (b) a statement of the witness' superiors and subordinates, and the testimony each gave, if such individuals testified earlier; (c) a statement of any proffer the witness or counsel has given the staff, or if arrangements have been made to arrange such a proffer; (d) a description of any particular circumstances why the witness should be given immunity, including age, health and personal problems, and equity considerations; and (e) additional information as to how the witness can further the investigation.

In cases where the individual may have engaged directly in the conduct under investigation, the Office of Operations usually will require, as a condition of approving the immunity recommendation, that the witness or counsel give a proffer and that the substance of the proffer be communicated to Operations and the Deputy Assistant Attorney General before the witness' testimony is compelled. This procedure seeks consistency in the treatment of witnesses in various investigations.

In addition to the memorandum describing the witnesses and the OBM-111-A forms, staff should also send a copy of the OBD-111-A form to the U.S. Attorney in the district where the grand jury is sitting, to give him adequate time to review the matter and make an independent determination of the matter before he petitions the Court for an immunity order. See U.S.A.M. 1-11.120.

Finally, the staff should prepare a letter from the Assistant Attorney General, Antitrust Division, to the U.S. Attorney in the appropriate district, requesting that the U.S. Attorney apply to the Court for an immunity order. The text of the letter is as follows:

> Dear __________:
>
> Pursuant to the authority vested in me by 18 U.S.C. 6003(b) and 28 C.F.R. 0.175(b), you are authorized to apply to the United States District Court for the District of __________ for an order pursuant to 18 U.S.C. 6002-6003 requiring [name of witness or witnesses] to give testimony or provide other information in the above matter in any further proceedings resulting therefrom or ancillary thereto.
>
> Sincerely yours,
>
> Assistant Attorney General
> Antitrust Division

The staff should check the practice in the District to determine whether the U.S. Attorney and the Court require separate authorization letters for each witness, or if all witnesses for whom immunity will be requested at that session can be named in one letter.

2. Antitrust Division Standards for Seeking Immunity Authorization

In determining whether it is necessary to the public interest to compel the testimony of a person for whom the staff has requested immunity, the following factors should be considered:

(a) The importance of the investigation to effective enforcement of the criminal antitrust laws;

(b) the value of the person's testimony or information to the investigation or prosecution;

(c) the likelihood of prompt and full compliance by the witness with a compulsion order, and the effectiveness of available sanctions if there is no such compliance;

(d) the person's relative culpability in connection with the offense being investigated;

(e) the possibility of successfully prosecuting the person prior to compelling him to testify or produce information; and

(f) the likelihood of adverse collateral consequences to the person if he testifies or provides information under a compulsion order.

Under most circumstances, the most significant considerations in reviewing an immunity authorization request will be the value of the persons testimony to the investigation, the degree of culpability of the individual involved and the likelihood that the individual will provide information that will materially advance the investigation.

In antitrust investigations, unlike many federal criminal investigations, some of the participants in the alleged conspiracy are among those who are likely to be immunized during the investigation. In those situations, it is required that Division attorneys obtain full and complete proffers of the testimony of those who are active participants in the conspiracy. The information obtained from the proffer should be provided to the Office of Operations and the Deputy Assistant Attorney General as soon as such information is available.

Under most circumstances, the Division will not seek immunity authorization for an individual who is a target of the investigation unless that individual or counsel gives the Division a full and candid statement of the proposed testimony of the witness that complies with the public interest considerations necessary to seek immunity authorization. See U.S.A.M. 1-11.210 to 1-11.216.

3. Obtaining a Court Order Authorizing Witness Immunity

Upon receipt of authorization from the Assistant Attorney General (See Section 1, supra) and the concurrence of the United States Attorney for the District in which the order is to be issued, the United States Attorney, together with the Division attorneys, will file a written motion and proposed order pursuant to 18 U.S.C. § 6003 to obtain a compulsion order. See U.S.A.M. 1-11.904 and 905. A motion for a compulsion order should be made in writing and may be made ex parte. Generally, such a motion may be made prospectively to avoid undue disruption of the grand jury proceedings, provided the attorney for the government is satisfied that the witness will not testify voluntarily. 2/

The Division will oppose any attempt by counsel for the witness to challenge the validity of a compulsion order. Government attorneys should oppose requests for affidavits concerning the authenticity of the signature on departmental authorizations as well as attempts to argue that the witness does not have sufficient time to confer with counsel on the testimony or the compulsion order. The sole function of the court is to ascertain that there is compliance with the statute. See U.S.A.M. 1-11.310.

Generally speaking, the attorney for the Antitrust Division, with the approval and signature of the United States Attorney, will present the appropriate motion, compulsion order, and authorization by the Assistant Attorney General to the court. These papers generally should

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2/ Although this is the general practice, the staff should consult with the United States Attorney to determine the local practice. Some judges may wish to hear the motion in court, others wish to have the witness and counsel present, and still others will sign the order in chambers.

be submitted to the Court in advance of the witness' actual testimony if the government attorney has good reason to believe that the witness will invoke his privilege against self-incrimination. This will expedite the procedures involved in conducting the grand jury itself.

Division attorneys should confer with the United States Attorney, or the designated Assistant United States Attorney, to determine what local procedures should be followed in moving the court for a grant of immunity, since these may vary. Once the court signs an immunity order, the Division attorney may then use it in the grand jury proceedings. As indicated supra, the witness should invoke his privilege against self-incrimination before the order is provided to him, or read to him, and that, in most circumstances, the order will be read to him by the grand jury foreman rather than the government attorney. Local practice, however, should be the basis upon which the Division proceeds.

4. Refusal of Witness to Comply with Compulsion Order

The refusal of a witness to testify or to give information pursuant to the issuance of a compulsion order under 18 U.S.C. § 6002 is punishable by contempt. Generally speaking, the government should move for civil, rather than criminal, contempt as a first step in such proceedings. Use of civil contempt, under 28 U.S.C. § 1826, is therefore preferable. See United States v. Wilson, 421 U.S. 309, 317, n.9 (1975).

28 U.S.C. § 1826 was enacted to provide a statutory basis for the application of summary civil contempt powers to recalcitrant witnesses. The purpose of the statute is to secure the testimony or evidence through the creation of an incentive for compliance by punishing the witness with imprisonment. When the witness complies with the order, he must be released. Thus confinement is limited to the life of the grand jury, but in no event may confinement exceed 18 months. For a general discussion of the civil and criminal contempt powers to be employed in a compulsion order situation, see U.S.A.M. 1-11.340 to 11.343.

5. Follow-up Reports

After a Division attorney completes the interrogation of an immunized witness, a written report, prepared by the Witness Records Unit of the Criminal Division, should be sent to the Office of Operations indicating whether the compulsion order was obtained and used, the outcome of the use of the order, and the location of recordings, reporter's notes or transcripts of the compelled testimony. A copy of the witness follow-up report is found at U.S.A.M. 1-11.906, and should be filled out as soon as possible after the witness has testified.

6. Use of Informal Immunity

It is the policy of the Antitrust Division to apply to the Court for use of compulsion orders pursuant to 18 U.S.C. § 6002, and not to employ informal immunity letters except under the most extreme circumstances. If an Antitrust Division attorney believes it necessary to employ informal immunity, the attorney must obtain the approval of the section or field office Chief, Office of Operations and the appropriate Deputy Assistant Attorney General prior to making any commitment to a witness or witness' counsel.

G. Using Search Warrants

The Division has utilized a search warrant to search the files of a company when there was substantial information to indicate that the company had not made a diligent search of its files as required by a grand jury subpoena. Although search warrants should be used sparingly, and only upon a clear showing of probable cause or reasonable grounds for the search, search warrants can provide an effective means of assuring that full compliance with subpoenas is obtained.

Seeking a search warrant requires the authorization of the Assistant Attorney General. The request for such authority should include a staff memorandum setting forth the facts and a copy of the affidavit that would be submitted to the court to support issuance of the search warrant. The request should be approved by the section or field office Chief and sent to the Office of Operations.

The affidavit must set out the items to be searched for, with specificity, and their connection with the commission of a crime. It should state the verbatim language used in the original grand jury subpoena, and the premises to be searched. These statements should appear on the face of the form "Affidavit for Search Warrant," obtained from the Clerk of the district court where the search warrant will be issued.

Attached to the affidavit form should be a sworn statement, based on personal knowledge, by the attorney handling the investigation that sets forth the facts establishing the basis for the search warrant. This statement should contain:

1. Name of author and position in Department;
2. Date of institution of the grand jury;
3. Results of the grand jury investigation to date indicating that a violation of the law has taken place;
4. Date of issuance of subpoena to company, compliance with which is questioned (attach a copy);
5. Description of response to subpoena and factual basis for believing compliance was not complete;
6. Description of efforts undertaken to obtain full compliance;
7. Location of documents that should have been submitted;
8. Statement of belief that criminal violation occurred;
9. Statement of belief that documents subject to subpoena have been withheld;
10. Statement that direction by court to re-search files would not be sufficient to obtain full compliance with subpoena; and
11. Statement of belief that there are at the location named documents that may constitute evidence of criminal violations of the antitrust laws.

A full description of search warrant procedures is found at U.S.A.M. 9-4.110. See, e.g. U.S.A.M. 9-4.112, 4.114, and 9-4.120.

A sample of an affidavit for a search warrant and accompanying papers is found in the Exemplar File as Exemplar Number 155.

H. Requesting Internal Revenue Service Information During A Grand Jury Investigation

When Division attorneys have substantial need to obtain information from the IRS, it should be obtained in compliance with the procedures in 26 U.S.C. § 6103.

The law classifies information generally into three categories: returns, taxpayer return information, and return information other than taxpayer return information.

Returns and taxpayer return information consist generally of the returns themselves and any supporting or related information furnished either by the taxpayer or by someone on the taxpayer's behalf. Disclosure by IRS of such information to Department of Justice personnel in connection with a non-tax matter is permitted only on order by a District Court. The third category -- return information other than taxpayer return information -- is information gathered by the IRS from third parties. Such information can be disclosed to Antitrust Division staffs upon a written request by the Assistant Attorney General to the Commissioner of IRS.

The procedures employed in obtaining such information are set out at *U.S.A.M.* 9-4.900 *et seq*. All requests for such information must be processed through the Office of Operations and approved by the Assistant Attorney General. Sample forms and pleadings are available at *U.S.A.M.* 9-4.900.

I. Notification or Approval Procedures in Certain Types of Investigations

There are two situations where information regarding the grand jury investigation must be reported to the Attorney General. First, the Attorney General must be notified of sensitive criminal investigations involving public figures or entities. Second, the Attorney General must give express approval to the issuance of a subpoena or the indictment of members of the news media or news media organization, including industry and trade publications.

1. Notice of Subjects of Sensitive Criminal Investigations

It is the policy and practice of the Department of Justice to keep appropriate Department officials, including the Assistant Attorney General of the Criminal Division, the Associate Attorney General, the Deputy Attorney General and the Attorney General advised of sensitive criminal investigations, particularly those where public officials or entities are the subjects of the investigation.

The notification function is not intended to interrupt or delay the normal conduct of the investigation; rather, it is only to keep appropriate officials of the Department informed of the investigation.

When the staff determines that the grand jury investigation is the type of sensitive investigation described at U.S.A.M. 1.5-600, the staff should notify the Office of Operations orally and then prepare a memorandum from the Assistant Attorney General, Antitrust Division to the Assistant Attorney General, Criminal Division indicating the name of the subject, a brief synopsis of the investigation and the individual's role in it, and the current status of the investigation.

The memorandum should be sent to the Office of Operations for review. It is then sent to the Assistant Attorney General, Antitrust Division, who will review it and, if approved, send it to the Assistant Attorney General, Criminal Division. It is then the responsibility of the Assistant Attorney General, Criminal Division, to notify the appropriate Department officials of the investigation and submit copies of the memorandum to them.

This procedure is applied only as a notice function and does not require special authorization of the investigation.

2. Approval of Subpoenas to and Indictment of Members of the News Media and News Organizations

Whenever an investigation requires information that may be obtained from members of the news media or news organizations, including industry or trade publications, the staff should attempt to obtain the necessary information from non-media sources before considering subpoenaing members of the news media. If such attempts are unsuccessful and news media sources are the only reasonable sources of the relevant information, the staff should attempt to negotiate with the news media member or organization to obtain the information voluntarily.

If such negotiations fail, the staff may not subpoena any member of the news media without the express approval of the Attorney General. The standards applicable in seeking the approval of the Attorney General are set forth at 28 C.F.R. § 50.10.

To obtain the Attorney General's approval, the staff should prepare a memorandum explaining the circumstances of the subpoena request, or indictment, and forward it to the Office of Operations, together with a memorandum to the Attorney General from the Assistant Attorney General, Antitrust Division, setting forth the factual situation and the reasons for the request, in accord with the principles in 28 C.F.R. § 50.10. Upon approval by the Assistant Attorney General, Antitrust Division, the memorandum will be forwarded to the Attorney General for his consideration.

During the time the Assistant Attorney General and the Attorney General are reviewing the request, the staff should not take any steps to begin the process of subpoenaing or otherwise interrogating the member of the news media. Staff should allow substantial review time for such a request.

Because of the Department's concern with issues involving freedom of the press, this procedure is the best means to maintain a consistent policy of fairness in dealing with the news media, balanced against the need for specific information to uncover violations of the law.

If the staff, or a section or field office Chief, have any questions as to the applicability of this procedure in certain circumstances, the matter should be discussed with the Office of Operations.

J. Investigating Related Criminal Activity

The Antitrust Division has uncovered other criminal offenses during the course of grand jury investigations of Sherman Act violations. These offenses fall into two general categories. First, the Division has investigated and prosecuted violations of the criminal law that affect the integrity of the investigatory process. These crimes include making a false declaration before a grand jury (18 U.S.C. § 1623) and obstruction of justice (18 U.S.C. § 1503). See Grand Jury Manual at 223-255. In addition, the Division has enforced various criminal statutes that are related to Sherman Act violations. Examples of the crimes prosecuted by the Division in recent years include (a) conspiracy to defraud the United States, 18 U.S.C. § 371; (b) false statements to a government agency, 18 U.S.C. § 1001; and (c) mail and wire fraud, 18 U.S.C. §§ 1341 and 1343, respectively.

1. Circumstances in Which the Division Investigates Other Criminal Violations

These crimes may be charged by the Division in transactions involving governmental agencies and transactions that employ the mails or the telephone as a part of the conspiracy. Although they are not employed in all cases, the Division exercises its prosecutorial discretion to bring such actions in cases where it is determined such prosecutions are warranted; e.g., U.S. v. Anthony J. Bertucci Construction Co., Inc. (bid rigging, false statements by signing affidavits of non-collusion, and mail fraud for contracts sent and checks received on river bank stabilization jobs for the U.S. Army Corps of Engineers); U.S. v. Smejkal (bid rigging and conspiracy to defraud the United States on sales of timberlands by the U.S. Forest Service); and U.S. v. J. Ray McDermott Co., et al. (mail and wire fraud relating to bid rigging on marine construction projects).

The full text of the relevant statutes that the Division has enforced in the past are found in Chapter II at II-59 and II-64. Generally, a conspiracy to defraud the United States count would involve a Sherman Act transaction only when the Government agency was defrauded by a bid rig or allocation scheme; a § 1001 false statement action would lie in situations where Sherman Act defendants also signed affidavits of non-collusion or certificates of independent bid determination; mail and wire frauds are prosecuted where the Division believes that such activities are an integral part of transactions that the Division finds violative of the Sherman Act.

2. Procedures for Obtaining Criminal Division Clearance and Assistance

Upon request from a section or field office for authority to conduct an investigation of possible perjury, obstruction of justice, etc., or upon the recommendation of an indictment on such charges if no separate investigation is conducted, the Assistant Attorney General, the Deputy Assistant Attorney General for Litigation or the Director of Operations will notify the Assistant Attorney General, Criminal Division, or the Deputy, of the proposed investigation or indictment. This is required by 28 C.F.R. § 0.179a, which provides:

> (a) Matters involving charges of obstruction of justice, perjury, fraud, or false statement, as described in Section 0.179, shall be under the supervisory jurisdiction of the Division having responsibility for the case or matter in which the alleged obstruction occurred. The Assistant Attorney General in charge of each Division shall have full authority to conduct prosecution of such charges, including authority to appoint special attorneys to present evidence to grand juries. However, such enforcement shall be preceded by consultation with the Assistant Attorney General in charge of the Criminal Division to determine the appropriate supervisory jurisdiction.
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> (b) In the event the Assistant Attorney General in charge of the Division having responsibility for the case or matter does not wish to assume supervisory jurisdiction he shall refer the matter to the Assistant Attorney General in charge of the Criminal Division for handling by that Division.

This regulation refers to all criminal matters involving perjury (18 U.S.C. § 1623(a)), obstruction of justice (18 U.S.C. § 1503), false statement (18 U.S.C. § 1001), and conspiracy to defraud (18 U.S.C. § 371) cases arising out of antitrust investigations. The staff assigned to the underlying antitrust investigation or prosecution will handle those criminal matters that are related to the antitrust violation.

Upon notification, the Assistant Attorney General, Criminal Division, or the Deputy, will clear the investigation or indictment to the supervisory authority of the Antitrust Division. A record of this clearance will be kept in the case file in Operations.

The Criminal Division, or the United States Attorney in the district, may also provide consultation or assistance to the Antitrust Division staff on these matters, if requested.

K. Standards of Conduct by Division Attorneys Before the Grand Jury

The Department of Justice has long held to the view that the prosecutor, in a grand jury proceeding, must always conduct himself or herself as an officer of the Court whose function is to insure that justice is done. The prosecutor must recognize that the grand jury is an independent body, whose functions include not only the investigation of crime and initiation of criminal prosecution, but also the protection of the citizenry from unfounded criminal charges. In presenting a matter to the grand jury, the prosecutor must be scrupulously fair to all witnesses and must do nothing to inflame or otherwise improperly influence the grand jury. *See U.S.A.M.* 9-11.015 *et seq*.

The Antitrust Division's grand jury investigations should always be conducted in this manner by use of the standards and practices outlined in this *Manual* and in the *Grand Jury Manual*.

When in doubt of the propriety of a certain action before the grand jury, the staff attorneys should consult the *Grand Jury Manual* and *U.S.A.M.* 9-11.000 *et seq.*. Staff also should consult with the section or field office Chief regarding specific issues, and, when appropriate, the Office of Operations is available for consultation if the Chief believes it necessary.

VII. Other Investigative Functions

A. Business Review Procedures

Under the Antitrust Division's Business Review Procedure, 28 C.F.R. § 50.6, business entities can ascertain the Division's present enforcement intentions with respect to proposed business conduct.

1. Origin and Development of Procedure

This procedure had its origin in what were know as "railroad release" letters, the first of which was issued by the Division in 1939. Under the "railroad release" procedure, the Division would review proposed business conduct and state whether it would forego the initiation of criminal proceedings should the proposed conduct be carried out. This was subsequently expanded to include a merger clearance procedure under which the Division would state its present enforcement intentions with respect to a merger or acquisition. In 1968, these practices were formalized as the Business Review Procedure, and regulations describing the procedure were issued at 28 C.F.R. § 50.6. [1]

2. Purpose

The Business Review Procedure provides substantial benefits to the Division and to the business community. From the Division's perspective, the procedure is beneficial since it brings to the Division's attention proposed business conduct which may be of questionable legality and provides a mechanism by which a speedy investigation can be carried out. The business community benefits by having a procedure that enables it to avoid costly litigation and other business problems that may arise when a company is involved in antitrust litigation with the government. Green v. Kleindienst, 378 F. Supp. 1397, 1398-9 (D.D.C. 1974).

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[1] The regulations were issued on February 1, 1968, 33 Fed. Reg. 2,422, and have been revised twice, 38 Fed. Reg. 34,804, (December 19, 1973) and 42 Fed. Reg. 11,831 (March 1, 1977).

3. Manner of Request

The business review process is initiated by a written request to the Assistant Attorney General. [2] At the outset, the Division, in its discretion, may refuse to consider the request. Such a refusal would occur where the request did not qualify for business review treatment. This most frequently involves requests relating to on-going business conduct since only proposed business conduct qualifies for the Business Review Procedure. Where the business conduct is subject to approval by a regulatory agency, a business review request may be considered before agency approval has been obtained only where it appears that exceptional or unnecessary burdens might otherwise be imposed on the requesting party or where the agency specifically asks the requesting party to seek a business review letter. In any event, the procedure relates only to the enforcement intentions under the antitrust laws, not under any other federal or state statute or regulatory scheme. 28 C.F.R. § 50.6(7)(a).

4. Processing the Request

If a request involves a matter appropriate for business review consideration, the Office of Operations refers the request to the section or field office having commodity or geographic jurisdiction over the product or service involved in the request.

The section or field office must follow the same procedures followed in opening a preliminary inquiry. A memorandum requesting authority must be submitted to the Office of Operations, and FTC clearance must be obtained before the review takes place. A request for an Antitrust File Number (ATR-170) should also be prepared and forwarded with the request for preliminary inquiry authority, as should an ACES Report of a New Matter (ATR-132). See Division Directives ATR-2710.2 "DOJ File Number Policy," and ATR-2810.1(4)(b) "ACES".

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[2] The initiation of a business review request does not in any way alter the responsibility of a requesting party to comply with the premerger notification provisions of the Hart-Scott-Rodino Antitrust Improvements Act of 1976. 28 C.F.R. § 50.6(7)(b).

5. Timing of Investigation

When authority is granted to conduct a business review, the Office of Operations sets an "action date" by which time the request should be investigated and returned to Operations for review. Each request for a business review letter should be handled as expeditiously as possible. A special time deadline is applied to business reviews concerning export trade. Export-related requests are to be answered within 30 business days from the date that the Division receives all relevant data concerning the proposed transaction.

6. Investigating a Business Review

Under the business review regulations, the requesting parties are under an affirmative obligation to provide the Division with all information and documents in their possession that the Division may need to review the matter. 28 C.F.R. § 50.6(5). The Division may also request additional information from the party or parties seeking review. Staff attorneys should also conduct whatever independent investigation they deem necessary. When appropriate, the staff may also wish to seek the assistance of the Economic Policy Office and the Evaluation Section.

7. Review Procedures

After examining a business review request, the Division may state its present enforcement intentions with respect to the proposed business conduct, decline to pass on the request, or take such other position or action as it considers appropriate. 28 C.F.R. § 50.6(8).

The staff should prepare a memorandum with its recommendations and submit a business review letter setting forth the Division's position. The section or field office Chief should review the staff recommendation and the business review letter and submit them, together with the Chief's recommendation, to the Office of Operations. Staff should also submit a draft press release based on the model press release for business reviews found at VII-35 and VII-36. After review by the Office of Operations, the matter will be reviewed by the appropriate Deputy Assistant Attorney General and, ultimately, by the Assistant Attorney General.

A party requesting a business review letter generally receives one of three responses from the Division: (a) that the Department of Justice does not presently intend to bring an enforcement action against the proposed conduct; (b) that the Department of Justice declines to state its enforcement intentions; or (c) that the Department of Justice will sue if the proposed conduct is put into effect. The second response means that the Division may file suit should the proposed conduct be implemented, while the latter indicates a clear intention to sue.

Examples of business review letters of each type discussed above may be found in the Division's Exemplar File as Numbers 150, 151, and 152. Generally, each letter sets forth (a) the procedural history of the request; (b) a description of the representations made by the requestor, (c) a statement of the Division's enforcement intentions, and (d) a description of the Division's procedures in making public the information in the business review file. A business review letter must be signed by the Assistant Attorney General, or, in his absence, by the Acting Assistant Attorney General.

At the same time the Division notifies the requesting party of the Division's action on the business review request, a press release is issued describing the action and attaching a copy of the Division's letter of response. Also at this time, the letter requesting the business review and the Division's letter in response are indexed and placed in a file available for public inspection. Within 30 days after notification, the information supplied in support of the business review request is placed in the publicly available file in the Division's Legal Procedure Unit.

The business review regulations provide that information submitted by a requesting party may be withheld from disclosure to the public upon a showing that disclosure would have a detrimental effect on the requesting party's operations or relations with customers, employees, suppliers, stockholders, or competitors. 28 C.F.R. § 50.6(10)(c). Since the amendments to the Freedom of Information Act in 1974, no court cases have discussed the status under that Act of materials supplied to the government in connection with a business review request. However, the type of information generally withheld from public disclosure is confidential commercial or financial information. Such information is not subject to compulsory disclosure under the Freedom of Information Act. 5 U.S.C. § 552(b)(4).

8. Judicial Interpretation and Review

It is important to note that a business review letter states only the enforcement intentions of the Division as of the date of the letter, and the Division remains completely free to bring whatever action or proceeding it subsequently comes to believe is required by the public interest. 3/

Where the Division has stated a present intention not to bring suit, the Division has never subsequently exercised its prosecutorial discretion to bring a criminal action if there was full disclosure at the time the business review request was presented to the Division. 28 C.F.R. § 50.6(9).

On only one occasion has judicial review been sought of the Division's statement of its present enforcement intentions in a business review letter. This occurred in Holly Farms Poultry Industries, Inc. v. Kleindienst, 1973-1 Trade Cas. ¶74,535 (M.D.N.C. 1973), where the Division had declined to state a present enforcement intention not to bring an antitrust action against Holly Farms should it become a member of the National Broiler Marketing Association. Holly Farms sought judicial review of this decision, claiming jurisdiction under the Administrative Procedure Act, 5 U.S.C. §§ 701 to 706. The court, relying on 5 U.S.C. § 701(a)(2), dismissed the suit, holding that the decision of whether or not to bring an action for violation of the antitrust laws is sufficiently committed to the discretion of the Attorney General to remove it from the group of judicially-reviewable actions. 1973-1 Trade Cas. at 94,382. In reaching its decision, the court relied in part on the fact that Holly Farms' inquiry concerned a proposed course of conduct. In dicta, the court suggested that there might be a different result where there was reliance on an earlier ruling and

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3/ United States v. Grinnell Corporation, 30 F.R.D. 358, 363, (D.R.I. 1962) (The Department of Justice's statement of a "present intention not to take action" cannot be equated with future immunity). See United States v. New Orleans Chapter, Associated General Contractors of America, Inc., 382 U.S. 17 (1965), reversing 238 F. Supp. 273 (E.D. La. 1965); United States v. E.I. duPont de Nemours & Co., 353 U.S. 586, 597-98 (1957); and United States v. Firestone Tire and Rubber Co., 374 F. Supp. 431, 434 n.1 (N.D. Ohio 1974).

actual present conduct subjecting the inquirer to prosecution. 4/ 1973-1 Trade Cas. at 94,383. Of course, an inquiry concerning actual present conduct would not qualify for treatment under the business review procedure.

4/ In Greenbrier Cinemas, Inc. v. Bell, Civ. No. 77-0035 (W.D. Va., January 19, 1978), the court held that a press release by the Department of Justice threatening legal action against so-called split-of-product agreements among motion picture exhibitors was judicially reviewable under the Administrative Procedure Act. The press release stated that the Department considered split agreements to be a *per se* violation of the antitrust laws and that continuation of such agreements after a particular date would subject the participants to legal action. It was admitted in the press release that this represented a change in the Department's position. This matter did not involve a business review request.

B. The Small Business Procedure

1. Purpose and Policy

The Small Business Act established the policy that "the Government should aid, counsel, assist, and protect, insofar as possible, the interests of small business concerns in order to preserve free competitive enterprise . . . ." (15 U.S.C. § 631(a)). The Act requires that the Attorney General submit an annual report to the Congress and the President on any federal government activity that may adversely affect small business (15 U.S.C. § 639(c)). The Antitrust Division prepares this report for the Attorney General.

For a number of years the Division's small business program has focused on providing information and occasional assistance to small businesses that contact the Division with particular problems. Generally, complaints received under this program do not involve antitrust violations, or, at most, involve violations involving a *de minimis* amount of commerce.

Nonetheless, it has been and remains Division policy to attempt to assist such complainants through general information regarding their rights, and occasionally through calls or letters to the business entities whose conduct has occasioned the problems for the complainants. It always is made clear in these situations that the Division is not enforcing a law and is not threatening potential enforcement proceedings between a supplier and a customer. The contacts are simply to assist "small business" complainants. For example, after a previously good relationship has been impaired by a misunderstanding, the Division has been able to persuade the supplier to resume dealing with a small business complainant. Also, suppliers who have decided that a particular customer does not purchase enough to warrant continuance of the account have occasionally been asked to reconsider such a decision.

2. Procedures

The following procedures should be used in handling small business complaints:

(a) Complaints from small businesses received directly by sections should be handled by staff attorneys in the section, following the standard procedures for handling complaints. This may involve re-routing the complaint to a different section, or referring it to the FTC through the liaison procedure of the Office of Operations. If, in the opinion of the staff attorney handling the matter, it would constitute a "small business complaint," a copy of the initial correspondence only should be sent to the Special Assistant to the Assistant Attorney General who handles small business matters. There is no requirement for consulting with or otherwise advising the Special Assistant of these matters.

When it is evident that the complaint does not involve a matter of antitrust significance, any attempt to assist the complainant must be handled most carefully to avoid any suggestion of improper government interference with or pressure on the private sector. In determining how best to handle these matters, constraints on resource allocation and the possibility of referring matters either to other government agencies or to state or local enforcement officials should be kept in mind.

(b) Small business complaints received by the Special Assistant handling such matters will be directed to the appropriate section with the Division after initial correspondence with the complainant. The initial correspondence will indicate whether the complainant should expect to be contacted by the Division for further information. If such contact is indicated, it should occur within three weeks after the initial letter is returned to the complainant.

VIII. Completing the Investigation and Recommending Civil or Criminal Suit

As the staff develops evidence that may establish a criminal or civil violation of the antitrust laws, staff should begin to determine what type of case, or cases, will be recommended, if any, and how the investigation should be concluded.

As indicated earlier in this chapter, the staff should be aware of Local Rules governing the filing of cases and the return of indictments. This is especially true where staff wishes to seek preliminary relief to stop an acquisition or other practice, since district practices differ markedly.

The staff usually undertakes three tasks at the conclusion of the investigation. First, it determines whether to proceed by criminal or civil case and select the defendants recommended for prosecution. Second, the staff will often afford counsel for the parties with an opportunity to present their views. Finally, the staff, in consultation with the Chief of the section or field office, prepares a fact memorandum, pleadings, a proposed press release and other papers relevant to a full consideration of the case.

Once the staff has completed these functions, the Division's reviewers assess the merits of the cases with a view towards considering all matters consistently and fairly. At the conclusion of the review process, the Assistant Attorney General makes the final decision as to whether to bring the action or to decline prosecution.

A. Making the Decision to Prosecute and Selecting Defendants to be Recommended for Prosecution

At the conclusion of the investigation, the staff should decide the type of case to be recommended, the defendants to be recommended for civil suit or criminal prosecution, and the timing of the prosecution. Timing is usually most significant in merger cases where the staff must decide whether to seek preliminary relief prior to consummation, and in grand jury investigations where the staff must make sure that the matter is presented to the grand jury within its period of service and within the period of the statute of limitations.

1. Recommending a Civil Action

In considering a recommendation to file a civil action, the staff should make every effort to obtain as much information during the investigation as possible, and should not rely on the ability to develop the case during pre-trial discovery. The expanded powers of the Antitrust Civil Process Act and the general philosophy of the Antitrust Division to expedite litigation to the greatest extent possible are important factors that should be considered during the investigative process.

After the staff has developed its evidence and made a preliminary assessment of the potential defendants in a civil suit, it will usually inform counsel for the potential defendants that they may make whatever arguments they deem appropriate to the staff and the section or field office Chief before sending a final recommendation to the Office of Operations. Staff should make this information known to all counsel whose clients may be parties to suit, not only those that the staff feels it will definitely recommend. This allows the staff to evaluate the arguments of all relevant parties and make the assessment of the evidence based on all available information. In general, counsel should be informed that the Division is considering suit and should never be informed that the Division has determined that the party will be sued. This practice exists since the final responsibility for making a decision to file suit rests with the Assistant Attorney General.

At the conclusion of the meetings with counsel who wish to make their views known to the staff, the staff will complete its fact memorandum and submit it to the section or field office Chief for review. The Chief will analyze the matter and make a recommendation in a cover memorandum and send it to the Office of Operations. Staff may, in its discretion, and after informing the Office of Operations of its intentions, inform counsel that they may wish to seek an appointment with the Office of Operations to present their views to the Director or Deputy Director of Operations. In general, parties that are recommended for suit may be afforded this opportunity; this opportunity may also be afforded to parties in situations involving close questions. The Office of Operations, the Chief and the staff may discuss whether meetings are appropriate, and it should be remembered that counsel are not entitled to such a meeting as a matter of right.

2. Recommending a Criminal Indictment

If a matter is being conducted before a grand jury, staff should make a preliminary assessment near the end of its grand jury investigation of the targets of the investigation.

"Target" is defined as a person "as to whom the prosecutor or the grand jury has substantial evidence linking him to the commission of a crime and who, in the judgment of the prosecutor, is a putative defendant. An officer or employee of an organization which is a target is not automatically to be considered as a target even if such officer's or employee's conduct contributed to the commission of the crime by the target organization, and the same lack of automatic target status holds true for organizations which employ, or employed, an officer or employee who is a target." *U.S.A.M.* 9-11.250 (January 24, 1979).

A "subject" of an investigation, on the other hand, is a person or entity whose conduct is within the scope of the grand jury's investigation. *U.S.A.M.* 9-11.250.

The Division will follow the Department's practice of informing individuals under certain circumstances that they are targets of the investigation and of advising them of the opportunity to appear voluntarily before the grand jury. *See* *U.S.A.M.* 9-11.252 and 9-11.253. In those circumstances where the individual wishes to appear before the grand jury voluntarily, the target should be informed that the Division attorneys may examine the person on all relevant information. Accordingly, the person may not simply read a statement and leave the grand jury room.

No similar right to appear before the grand jury extends to corporate entities. The staff ordinarily will inform counsel for a corporate entity that the Division is seriously considering recommending the indictment of the corporation and counsel may present its views to the staff and section or field office Chief. As with a civil case recommendation, the staff should never inform counsel that the corporations or individuals will be indicted. Rather, counsel should be informed that the Division is seriously considering such a recommendation to the grand jury. This procedure applies to those corporations and individuals that the staff believes pose close questions, as well as those who may ultimately be recommended for indictment.

As in a civil case, counsel do not have any absolute right to be heard by the Office of Operations. The Office of Operations, in its discretion, will ordinarily consider the arguments of counsel in making its final recommendation, but only after counsel has already met and discussed the issues with the staff.

It should be noted that the purpose of meetings with counsel by staff and Operations is not to debate the issues and facts of the proposed case; rather, both staff and Operations will listen to the arguments of counsel against indictment. Neither Operations nor staff can disclose relevant factual details to counsel since the secrecy provisions of Rule 6(e) of the Federal Rules of Criminal Procedure apply to the evidence developed before the grand jury.

After listening to the views of counsel and, if appropriate, allowing the individual "targets" of the investigation the opportunity to appear before the grand jury, the staff should submit its fact memorandum to the Office of Operations.

B. Preparation of Fact Memoranda

Fact memoranda in civil and criminal cases should be prepared by the staff as a full statement of the factual and legal basis of its investigation. While it is ultimately used in the review process, its primary purpose is for staff analysis of its case, including pointing out to the staff the problems or gaps that may still exist in the case. The memorandum assists the staff in making its final judgments on the evidence.

Although the staff has a close familiarity with the evidence and parties involved, the fact memorandum should be drafted with a view towards fully explaining the case to individuals with less detailed knowledge of the industry and facts, e.g., the section or field office Chief and the reviewers.

When sent forward to Operations, the fact memorandum should be accompanied by the Chief's cover memorandum, all pleadings in the matter, a press release (see Chapter VII, Section VII (A)), and a list of counsel who have requested a meeting with the Office of Operations.

1. Criminal Cases

The following information is usually set forth in separate sections of a fact memorandum recommending return of an indictment:

a. Table of Contents

If the fact memorandum is more than 50 pages in length, a table of contents should be prepared listing the various headings and subheadings in the memorandum with the corresponding page numbers.

b. Summary of Offense

The first section of the memorandum should summarize the highlights of the case in a page or two to place the discussion of the evidence in context and to set forth the general framework of the case.

The summary section should include at least the following:

1. The statute violated;
2. Whether the case is a misdemeanor or a felony;
3. The judicial district in which the proposed indictment would be returned, and the expiration date of the grand jury;
4. The number of proposed corporate and individual defendants. If they are few in number, they may be listed here together with the company affiliation and position of individual defendants. If the number is fairly large, the names and other information should be set forth in a separate section immediately following the summary;
5. The duration of the conspiracy;
6. The product involved;
7. The area involved in the conspiracy, *e.g.*, nationwide or a particular geographic area;
8. The level of product distribution -- manufacturers, wholesalers, retailers;
9. A brief summary of the evidence indicating how the conspiracy was formed and carried out;

10. The amount of commerce affected on an annual basis;

11. A reference to any other problem the staff perceives, such as the statute of limitations, interstate commerce, multiple conspiracy problems, etc;

12. Whether the staff recommends the filing of a companion civil injunctive complaint and the reasons why such a complaint should or should not be filed; and

13. Whether the staff recommends the filing of a government damage action and the reasons why the action should or should not be filed.

c. Proposed Defendants

The proposed corporate defendants should be listed and described. The proposed individual defendants should be listed, together with their company affiliation and positions each held during the conspiratorial period.

d. Summary of the Evidence

This section should set forth the evidence establishing the conspiracy. To the extent practicable, the evidence should be set forth in chronological order.

e. Summary of the Evidence Against Each Proposed Defendant

In a separate section, the evidence against each proposed corporate and individual defendant should be separately summarized. Other factors that have been considered and that may be significant in making defendant selection decisions should be described, including a personal profile, detailing information such as age, state of health, personal or business hardship, etc.

f. Persons and Companies Not Recommended for Indictment

In a separate section, the fact memorandum should list the persons and companies that were subjects of the investigation but are not being recommended for indictment. The evidence against each must be summarized, and the staff must set forth the reasons why indictment is not recommended. Relevant factors, such as the extent of cooperation, age, state of health, personal hardship, etc., should be described.

g. Assessment of Companion Civil Action or Federal Damage Action

The staff should set forth the arguments for bringing or declining to bring a companion civil suit. If the staff proposes a damage action, it should set forth, in detail, its damage theory and estimated amount of damages.

h. Assessment of State Damage Action

The staff should separately state whether it believes that any state or group of states should be notified of the case pursuant to Section 4F(a) of the Hart-Scott-Rodino Antitrust Improvements Act of 1976. (*See* Chapter VII, Section III.) The staff should consider the basis for any state cause of action, including the factual circumstances of the alleged violation, the posture of the state as a potential damage claimant under existing law, and the likely effect of the alleged violation on cognizable state interests.

i. Alphabetical List of Names

A list of all significant companies and persons involved in the conspiracy, arranged alphabetically, must be attached as an appendix to the fact memorandum. Brief identifying information should be included such as company affiliation, position(s) held, role in the conspiracy, etc.

2. Civil Cases: Non-Merger

In fact memoranda recommending the filing of civil cases alleging violations other than Section 7 Clayton Act violations, the memoranda should follow the same basic pattern as described for criminal cases.

3. Civil Merger Cases

In Section 7 cases, the memorandum should contain the following sections:

a. Table of Contents

If the fact memorandum is more than 50 pages in length, a table of contents should be prepared listing the various headings and subheadings in the memorandum with the corresponding page numbers.

b. Summary of Violations

In Section 7 cases, the first section of the memorandum should briefly summarize the highlights of the matter and should include at least the following information:

1. The fact that the staff is seeking to challenge the transaction under Section 7;
2. The date by which the Division must file, especially if the staff is seeking a temporary restraining order or preliminary injunction; 1/
3. The district in which the proposed complaint would be filed;
4. The date of the acquisition, the consideration paid, and the stock or assets acquired;
5. Identification of the acquiring and acquired companies;
6. The type of acquisition (horizontal, vertical, conglomerate) and the companies involved (manufacturers, wholesalers, retailers);
7. A general description of the markets, product and geographic, and any relevant submarkets;
8. The dollar universe in the markets and submarkets and the extent of industry concentration;
9. Market shares and industry ranking of the companies before and after the acquisition;
10. Relief sought; and
11. A short description of any other unusual problems involved.

c. The Companies Involved

This section should describe in some detail the companies involved in the merger or acquisition.

1/ Often, Local Rules govern the time of filing and when a hearing may be scheduled. The Local Rules of the District always should be consulted to determine this.

d. Summary of the Evidence

This section of the memorandum should set forth the evidence demonstrating the appropriateness of the product and geographic markets, the universe of each market, the extent of concentration in each market, and the market shares, as well as any special economic or industry conditions that would be affected by the acquisition.

e. Relief Sought

Each fact memorandum should set out the proposed relief that the staff wishes to achieve, as well as an analysis of the effects denial of preliminary injunctive relief would have on the transaction (possibility of hold separate order, etc.). This relief section is highly significant in determining the reasons for filing suit.

C. Procedures for Review of Case Recommendations

After meeting with counsel and review of the final fact memorandum and pleadings by the Chief of the section or field office, the package is sent to the Office of Operations for review.

Upon receipt by the Office of Operations, the matter will be referred to either the Director or Deputy Director of Operations, who will review the matter and confer with the Chief and staff as necessary. As indicated in A, supra, the Director or Deputy Director, together with the Special Assistant for the section or field office, may also meet with counsel for the proposed defendants and provide counsel with an opportunity to make an oral presentation to Operations.

Upon review, Operations submits its recommendation to the Assistant Attorney General, through the Deputy Assistant Attorney General for Litigation, or, if the case involves one of the regulated industries sections, the Deputy Assistant Attorney General for Regulatory Activities. The reviewing Deputy may simply agree with the Operations' memorandum or write a separate memorandum expressing differing views or clarifying certain issues. The entire package is then reviewed by the Assistant Attorney General.

Only in extremely rare circumstances, where a significant issue arises, will counsel for the potential defendants be provided with an additional opportunity to make a presentation to the Assistant Attorney General.

When a final decision is made by the Assistant Attorney General, staff will be informed immediately. If a case is to be filed, the matter will be returned to the staff with the approval papers, signed pleadings, and any other additional information that will be required for filing. At that point, the staff will commence litigation of the matter.

In both civil and criminal actions, the staff must inform the Office of Operations of the fact that the case is filed immediately after filing so that Operations may authorize issuance of the press release. 2/ Staff should inform Operations of the docket number and judge assigned to the case.

The investigative procedures employed by the Division are subject to modification in specific investigations. As a general matter, however, the Antitrust Division is committed to a planned and consistent pattern of action.

2/ At the time a case is filed, staff should follow the procedures set forth in Chapter VII, Section VII relating to the Department's press policy.

CHAPTER IV

LITIGATION

The purpose of this Chapter is to outline some of the practices and procedures that have been employed by the Antitrust Division in civil and criminal litigation. The Chapter is not intended as a litigation handbook; rather, it attempts to address selectively a number of practices that are part of any litigation effort. Trial staffs should make use of a variety of source materials including various trial handbooks; the Handbook of the Attorney General's Advocacy Institute; the Division's Exemplar File and work products available in the files of the sections and field offices and in the Legal Procedure Unit; and the suggestions and services that are described in detail in Chapter VI, Section II, "A Guide to Conducting Antitrust Investigations."

Because of the varied nature of the matters most common in antitrust litigation, this Chapter presents certain issues in a detailed manner and others only as an outline of possible issues or questions. As such, the civil litigation sections contain a brief description of the preparation and filing of the complaint; a detailed legal and practical analysis of the requirements and standards for obtaining preliminary relief; an outline of issues that may arise during civil discovery; a brief discussion of the trial of a civil case and suggested methods of expediting and streamlining litigation; and a detailed description of the manner of negotiating and entering consent decrees. The criminal litigation section includes a description of the preparation and filing of the indictment, an outline of pre-trial discovery and motion practice, a list of practical trial suggestions, and a description of the considerations in negotiating plea bargains and recommending sentences to the court in appropriate circumstances. The final section of the Chapter sets forth the procedures employed in preparing or opposing an appeal in either a civil or criminal action.

It is impossible to establish any one set of procedures for the conduct of the Division's pre-trial and trial efforts. Since each case poses problems that are unique to the particular facts of a given case, this Chapter should be employed only as a starting point from which ideas and strategies may be developed.

I. Beginning Civil Litigation

A. Drafting and Filing the Complaint

Since civil litigation begins with the filing of the complaint, the procedures are similar regardless of the type of violation alleged or whether the Division is seeking preliminary relief. The staff will have prepared a complaint for submission to the section or field office Chief and the Office of Operations at the time it submits the fact memorandum and other materials.

Each section and field office maintains files of the types of complaints that are employed for different violations and in different circumstances. The Legal Procedure Unit maintains files of all complaints and accompanying papers that are filed by the Division. The LPU files are an excellent source of complaints that will assist the staff in drafting the complaint based on particular facts.

The staff should also consult the local rules and practices of the district where the complaint will be filed to determine the specific requirements of the district (e.g., type of paper, form of caption, etc.). The local U.S. Attorney's Office should be consulted to insure the correctness of the form.

Sample complaints will provide the basic style and substance of the complaints filed by the Division. There are two areas of significance that should be carefully considered by the staff in preparing the complaint.

First, in alleging venue, the staff should be alert to where the defendants transact business or are found. At least one of the defendants must meet this venue requirement. While it is often the case that all of the defendants will meet the venue requirements, there are sometimes situations where one or more of the defendants do not, or may not, meet the requirement. In such instances, the complaint should indicate that fact and, in the prayer for relief, the complaint should ask that the court issue summons to the defendants not meeting the venue requirement to bring them within the court's jurisdiction for purposes of the litigation. This issuance of summons is provided for under Section 5 of the Sherman Act, 15 U.S.C. § 5, if the case arises under the Sherman Act and under Section 15 of the Clayton Act, 15 U.S.C. § 25, if the case arises under the Clayton Act.

The second important factor that should be considered is that interstate commerce should be alleged as clearly as possible consistent with the specific facts of the case. Whenever possible, the staff should allege both the "affecting" and "in commerce" tests. It is suggested that the complaint carefully allege the factual basis of the staff's interstate commerce theory, as well as state the general allegation of interstate commerce.

In addition to these two practical matters, the complaint should be a concise statement of the allegations and the relief prayed for by the Division.

The complaint should be filed with the Clerk of the Court in the district, together with whatever forms the Clerk requires under local procedures. The U.S. Attorney's Office should be consulted concerning the forms to be filed and the summons to be issued.

B. Post Filing Procedures

Once the complaint is filed with the Clerk of the district court, the complaint and summons should be issued to the defendants, pursuant to Rule 4 of the Federal Rules of Civil Procedure. As a courtesy, the staff should inform counsel of the fact of filing.

Immediately upon filing the complaint, the staff should inform the Office of Operations of the filing. Operations will notify the Public Information Office, so the press release may be issued, and the Legal Procedure Unit, so it may prepare copies of the complaint for distribution.

After the parties have been informed of the filing of the complaint and all local district procedures have been completed, staff should follow the local practices and Federal Rules in setting up whatever conferences are deemed necessary to expedite the matter.

When appropriate, procedures for obtaining preliminary relief through a temporary restraining order or preliminary injunction should begin. Those procedures are described in detail in Section II, *infra*.

II. Obtaining Preliminary Relief: Temporary Restraining Orders and Preliminary Injunctions

This Section sets forth the legal analysis and procedures that will assist a Division trial staff in determining whether to seek preliminary relief. The legal discussion is more extensive than that in any other section of this Chapter. Trial staffs are more likely to need a readily available source of case law and analysis in this area since preparation time is usually short and staff is confronted with numerous factual and legal considerations. While this analysis is not exhaustive, it raises the major legal issues that may arise in preparing to seek preliminary relief, as well as the procedures that must be completed before a hearing is held.

The purpose of preliminary relief is to "create or preserve a state of affairs such that [the court] will be able, upon conclusion of the full trial, to render a meaningful decision for either party." 1/ It should be sought by the Division whenever, in its absence, the relief obtainable following a trial on the merits may not be adequate to restore effective competition in the affected market or where an interim anticompetitive impact is likely. Preliminary relief is particularly appropriate in Section 7 cases, but is also available in others, including actions brought under Sections 1 and 2 of the Sherman Act. 2/

A temporary restraining order (TRO) is the most restricted form of preliminary injunctive relief. Its purpose is to prevent imminent and irreversible developments that may seriously compromise the applicant's right to relief on the merits until there is opportunity to hold a hearing on an application for preliminary injunction. A TRO may be issued with or without notice to, or appearance by, the adverse party (although efforts should be made to give notice). It is strictly limited in duration and is nonappealable.

1/ Developments in the Law -- Injunctions, 78 Harv. L. Rev. 994, 1056 (1965).

2/ 15 U.S.C. § 4; De Beers Consol. Mines, Ltd. v. United States, 325 U.S. 212, 220 (1945). See e.g., United States v. American Column & Lumber Co., 263 F. 147 (W.D. Tenn. 1920), permanent decree aff'd, 257 U.S. 377 (1921) (violation of 15 U.S.C. § 1); Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc., 351 F. Supp. 462 (E.D. Pa. 1972) (violation of 15 U.S.C. § 2).

A preliminary injunction performs a similar function to a TRO, pending a trial and ultimate disposition of the case, but it is designed to be a more measured response, based on a more complete record. The affected party must be given a full and fair opportunity to contest the requested relief. In most cases, an evidentiary hearing, often of substantial proportions, will be held. The order, if granted, may be of indefinite duration, it must be supported by detailed findings of fact and conclusions of law, and it is immediately appealable.

In addition to jurisdictional prerequisites, the issuance of temporary restraining orders and preliminary injunctions is governed by a variety of procedural and substantive rules.

A. Procedural Requisites

1. Temporary Restraining Order

Rule 65(b) of the Federal Rules of Civil Procedure places a variety of restrictions on TRO's issued *ex parte* and without notice to the adverse party, and it provides for a hearing on motion by the adverse party for dissolution or modification of the order.

a. Notice

Rule 65 provides that a TRO may be granted without notice or appearance by the adverse party only in circumstances where the applicant makes a "clear" showing from "specific facts" of "immediate and irreparable injury" that will occur before the adverse party can be heard in opposition and certifies the efforts made to give notice and the reasons for proceeding without it. The rule expresses a clear preference for informal notice over none at all.

The provisions of Rule 65 concerning TRO's are highly ambiguous. The rule is silent as to what qualifies as notice and as to the conditions applicable to TRO's issued with notice and appearance by the adverse party. In actual practice, the restraints of Rule 65(b) are often applied to all TRO's, regardless of notice or appearance. [3] This is almost uniformly true of the rule's 10-day limitation (that is specified only for orders granted "without notice"), and seems commonly to be the case with the certification of attempts to notify the adverse party. 4/

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[3] *See generally* 11 C. Wright & A. Miller, Federal Practice and Procedure § 2951 (1973) (hereinafter Wright & Miller).

The practical import of current TRO practice is that Division attorneys should follow the rules for orders issued without notice regardless of whether actual notice has been given, and every effort should be made to follow the rule's preference for as much actual notice as is possible.

If the case is filed sufficiently far in advance of the transaction to permit an application for preliminary relief to be brought on as a regular motion, the request should ordinarily be for a preliminary injunction. This of course assumes that the necessary hearing can be completed and the issue decided by the date of the proposed transaction. If the schedule is a tight one, a temporary restraining order may still be required to insure that a decision will be timely made. In addition, it may be tactically useful to seek a TRO as a means of obtaining an expeditious hearing on the application for a preliminary injunction.

b. Hearing

No form of hearing is prescribed. TRO applications are sometimes heard in chambers and off the record, although each party has a right to have the proceedings recorded. 5/ It may be necessary to insist that a record be made.

4/ In the Southern District of New York, for example, the applicant for a temporary restraining order must submit an affidavit detailing his efforts to notify the adverse party and the reasons why notice should not be required and why an order should be issued before the adverse party can appear, even if the adverse party has in fact been notified and appears at the hearing.

5/ See 28 U.S.C. § 753(b); National Farmers' Organization, Inc. v. Oliver, 530 F.2d 815 (8th Cir. 1976).

TRO's are commonly issued on the basis of affidavits and a verified complaint. The affidavits need not satisfy the requirements of Rule 56, 6/ though affidavits based on personal knowledge are likely to be accorded greater weight than those made on information and belief.

c. Duration

According to Rule 65(b), a temporary restraining order issued without notice is effective for only 10 days, although it can be extended for "a like period" upon a showing of good cause or consent of the parties. The same rule applies to those issued with informal notice. 7/ Restraining orders ordinarily should be drafted to specify their duration. If the order does not state how long it will remain in effect, it automatically expires after 10 days, unless extended. 8/

6/ There is no case law defining the standard for judging the type of affidavit to be offered to support a Rule 65(b) motion. However, it is clear that a preliminary injunction may be based on affidavits and hearsay information, and it would seem anomalous to hold the applicant to a higher standard on the more summary temporary restraining order. A contrary due process argument can be made, however, where the order is issued without any notice or appearance by the adverse party. See Wright & Miller § 2952 at 515-16.

7/ See Granny Goose Foods, Inc. v. Brotherhood of Teamsters, Local 70, 415 U.S. 423, 433 n.7 (1974): "Although by its terms Rule 65(b) . . . only limits the duration of restraining orders issued without notice, we think it applicable to the order in this case even though informal notice was given." The remainder of the Court's discussion implied that an order extending beyond the time period allowable for *ex parte* TRO's in Rule 65(b) must be judged according to the standards applicable to preliminary injunctions. See also Pan American World Airways, Inc. v. Flight Engineers' Int'l Ass'n, 306 F.2d 840, 842 (2d Cir. 1962); Connell v. Dulien Steel Prods. Inc., 240 F.2d 414, 417 (5th Cir. 1957), *cert. denied*, 356 U.S. 968 (1958).

8/ Granny Goose Foods, *supra*, at 443-44; 7 Moore's Federal Practice ¶ 65.07 (2d ed. 1978) (hereinafter Moore).

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The cases do not offer much guidance as to the grounds for extending a TRO. It is clear that the proponent of an extension must move for renewal before the original order expires. 9/ It is also clear that the order may be extended for longer than 10 days when that extension is consented to by the adverse party. 10/ There is little law as to what constitutes good cause for extension. It should be sufficient that more time is required to complete the hearing 11/ or for submission of additional evidence 12/ on the application for preliminary injunction, or for the court to prepare its decision, 13/ at least as long as the grounds for originally granting the order continue to exist. 14/

A 20-day maximum presents serious practical problems in cases where a party acting diligently and in good faith is unable to obtain a hearing or is unable to complete a hearing on the requested preliminary injunction prior to the expiration of 20 days. 15/ When a temporary restraining order is continued beyond the 10 or 20 days permitted by Rule 65(b), it may be treated as a preliminary injunction for purposes of appeal. 16/

9/ Wright & Miller § 2953 at 518; Moore ¶65.07 at 80-81.

10/ *See, e.g.*, Sims v. Greene, 160 F.2d 512, 516-17 (3d Cir. 1947).

11/ *See* United States v. U.M.W., 330 U.S. 258, 301 (1947).

12/ *See* Weyenberg v. Town of Menasha, 409 F. Supp. 26, 27-28 (E.D. Wis. 1975).

13/ *See* Steinberg v. American Bantam Car Co., 76 F. Supp. 426, 433 (W.D. Pa. 1948), *appeal dismissed as moot*, 173 F.2d 179 (3d Cir. 1949).

14/ Wright & Miller § 2953 at 518; Moore ¶65.07 at 80-81. The Supreme Court has assumed that the rule by its terms permits only a single extension.

15/ *Cf.* Consolidation Coal Co. v. Disabled Miners of Southern West Virginia, 442 F.2d 1261, 1268-70 (4th Cir.), *cert. denied*, 404 U.S. 911 (1971).

16/ *See, e.g.*, Sampson v. Murray, 415 U.S. 61, 86 (1974); Telex v. IBM, 464 F.2d 1025, 1025 (8th Cir. 1972); National Mediation Board v. Airline Pilots Ass'n, 323 F.2d 305, 305-06 (D.C. Cir. 1963).

d. Form of the Order

According to Rule 65(b), every temporary restraining order granted without notice "shall be indorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice." Orders issued with informal notice and appearance should make a comparable recitation. Both the date of expiration (with provision for extension) and the date of the hearing on the motion for a preliminary injunction should be specified in the order. Depending on local rules and practice, the latter provision may take the form of an order to show cause, though this method is generally disfavored. The order must also comply with the requirements of Rule 65(d).

2. Preliminary Injunction

a. Notice and Hearing

Rule 65(a)(1) states that no preliminary injunction may issue without notice. Notice is again undefined although a minimum requirement of 5 days is implied from Rule 6(d). 17/ The requirement is perhaps best interpreted, however, in light of its purpose: to provide the adverse party a full and fair opportunity to oppose the application. Whatever satisfies that objective should satisfy the notice requirement of Rule 65(a)(1). 18/

A similar approach should be taken concerning the hearing contemplated by Rule 65(a)(2). Although a preliminary injunction can be based on affidavits and documents, this generally will be appropriate only where neither party requests an evidentiary hearing or there is no controversy as to the material facts. In most cases an evidentiary hearing will be necessary.

17/ Wright & Miller § 2949 at 468. This may also be read as referring to the notice ordinarily required for motions. This is 10 days in most districts, but the court is generally empowered to shorten the time period.

18/ *See* Marshall Durbin Farms, Inc. v. National Farmers Organization, Inc., 446 F.2d 353, 356-58 (5th Cir. 1971); Sims v. Greene, 161 F.2d 87, 88-89 (3d Cir. 1947).

Preliminary injunction hearings in antitrust cases tend to be moderately lengthy, averaging about one week of trial time. In most respects they resemble a scaled-down plenary trial. As provided in Rule 65(a)(2), the court may order the trial on the merits consolidated with the hearing on the application for preliminary injunction. Since the court may order this, the staff should be prepared for a trial on the merits as soon as the papers are filed. While this is often difficult, the staff should be aware of the possibilities. Even if this is not done, all evidence received at the hearing that would be admissible at trial automatically becomes part of the record and need not be repeated at trial, although it may be reintroduced if there is adequate reason to do so. 19/ Consolidation of a trial on the merits with a preliminary injunction hearing is an abuse of discretion if it deprives a party of its right fully and fairly to present its case on the merits. 20/

b. Duration and Form of the Preliminary Injunction

A preliminary injunction, unlike a TRO, can be of indefinite duration. It will ordinarily remain in effect until completion of a trial on the merits, though the court retains plenary power to dissolve or modify it as circumstances warrant. 21/

Rule 65(d) requires that the injunction or restraining order set forth the reasons for its issuance in specific terms and describe in reasonable detail, "and not by reference to the complaint or other document," the acts sought to be restrained. It specifies that such orders are binding "only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise." Findings of fact and conclusions of law are mandated by Rule 52 when granting or denying interlocutory injunctions.

19/ Moore ¶65.04[5]; Wright & Miller § 2950 at 493.

20/ Moore ¶65.04[4]; Wright & Miller § 2950 at 486-89. See, e.g., Penn v. San Juan Hospital, Inc., 528 F.2d 1181, 1186-87 (10th Cir. 1975).

21/ See Moore ¶65.05 at 74.

c. Appeal

There is no statutory provision permitting appeal of a temporary restraining order, although a TRO that extends beyond the time limits of Rule 65(b) may be treated as a preliminary injunction for purposes of appeal.

Preliminary injunctions are appealable under 28 U.S.C. § 1292(a)(1). Both the district court and the court of appeals are authorized either to grant or to stay a preliminary injunction pending appeal. 22/ Such orders are frequently granted, and appeals of the grant or denial of a preliminary injunction may be heard on an expedited basis. 23/

The articulated scope of review on appeal is narrow. Most courts state that they will reverse only for abuse of discretion 24/ or an error of law. 25/

d. Standard for Granting Preliminary Injunction

The courts have employed a diversity of formulations to describe the requisites for granting a preliminary injunction, but the core concepts are well recognized.

> The traditional standard for granting a preliminary injunction requires the plaintiff to show that in the absence of its issuance he will suffer irreparable injury and also that he is likely to prevail on the merits. It is recognized, however, that a district court must weigh carefully the interests of both sides. Doran v. Salem Inn, Inc., 422 U.S. 922, 931 (1975).

22/ Rule 62(c), Fed. R. Civ. P.; Rule 8(a), Fed. R. App. P.

23/ Nussbaum, Temporary Restraining Orders and Preliminary Injunctions -- The Federal Practice, 26 Sw. L. J. 265, 270-71 (1972).

24/ See, e.g., Doran v. Salem Inn, Inc., 422 U.S. 922, 931-32 (1975); American Medical Ass'n v. Weinberger, 522 F.2d 924 (7th Cir. 1975); SCM Corp. v. Xerox Corp., 507 F.2d 358, 360 (2d Cir. 1974).

25/ See, e.g., Selchow & Righter Co. v. McGraw-Hill Book Co., 580 F.2d 25, 27 (2d Cir. 1978); Jones v. Snead, 431 F.2d 1115, 1116 (8th Cir. 1970).

The public interest affected by the granting or withholding of preliminary relief is a final factor often listed as relevant to the issuance of preliminary injunctions, and, in a case brought by the government, it may pre-empt or modify some of the traditional elements of the test.

(1) Reasonable Probability of Success on the Merits

The most common test employed by the courts has been the requirement that the plaintiff demonstrate a reasonable probability of success on the merits. While many courts have used a variety of means of articulating this concept, all courts agree that the plaintiff is required to present a prima facie case but need not demonstrate the certainty of winning at trial. See Wright & Miller § 2947 at 459-52.

It is important to remember that Section 7 of the Clayton Act is itself an incipiency statute, directed at mergers or acquisitions that may have the effect of substantially lessening competition. Final relief in Section 7 cases is essentially a form of preliminary relief, predicated on a showing of the likelihood of future competitive harm. Because the substantive standard for liability in such cases so closely resembles the test for likelihood of success commonly applied to preliminary injunctions, courts may be led to assume that the government must show a substantial likelihood that competition will be lessened by the proposed transaction before it can be preliminarily enjoined. 26/ This is incorrect, for it imposes on the government the immediate burden of proving its right to final relief. 27/

26/ See, e.g., United States v. Gimbel Bros., Inc., 202 F. Supp. 779, 780 (E.D. Wisc. 1962).

27/ Comment, "Preliminary Preliminary" Relief Against Anticompetitive Mergers, 82 Yale L.J. 155, 157 (1972).

A preliminary injunction against a merger or acquisition is not simply preliminary relief against a threatened harm; it is "preliminary preliminary" relief against the threat of a threatened harm. 28/ Properly applied, the probability-of-success-on-the-merits test requires something less than a probable substantial lessening of competition. The standard should be whether the government is able to demonstrate "a reasonable probability of a reasonable probability of a substantial lessening of competition." 29/

Because of time and discovery constraints, the government's arguments concerning its case on the merits often concentrate heavily on structural evidence of probable anticompetitive effect (market shares, levels of concentration, trends toward concentration, etc.). This emphasis is appropriate. Defendants, however, can be expected to criticize this approach, relying on cases like General Dynamics 30/ (which was not a preliminary relief case) to argue that factors other than the traditional structural criteria should be taken into account. To the extent that it is possible at a preliminary stage to go beyond structural evidence, such a showing should be made. 31/ In other cases, such a showing, given the time and discovery constraints and the standard for preliminary relief, is neither necessary nor possible,

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28/ Id. at 158.

29/ Report to the President and the Attorney General of the National Commission for the Review of Antitrust Laws and Procedures 138 n.43 (separate views of Commissioner Gordon Spivak, criticizing application of any standard requiring a lesser showing of the likelihood of success on the merits) [hereinafter cited as Antitrust Commission Report]. See also Pargas, Inc. v. Empire Gas Corp., 423 F. Supp. 199, 222-23 (D. Md. 1976) ("a substantial probability of establishing that the effect of [the transaction] 'may be' substantially to lessen competition").

30/ United States v. General Dynamics Corp., 415 U.S. 486 (1974).

31/ Id. at 498, quoting from Brown Shoe Co. v. United States, 370 U.S. 294, 321-22 (1962).

and defense arguments that a case such as General Dynamics fundamentally affected either the validity of earlier cases which relied primarily on structural evidence or the type of evidence sufficient to obtain preliminary relief should be resisted. 32/

Under Brown Shoe, Philadelphia National Bank, and General Dynamics, "[s]tatistics reflecting the shares of the market controlled by the industry leaders and the parties to the merger are, of course, the primary index of market power . . . ." 33/ The government is entitled to rely on such evidence to make a prima facie case of probable anticompetitive effect, and the defendants are entitled to attempt a rebuttal by showing "that the market-share statistics gave an inaccurate account of the acquisition's probable effects on competition." 34/ If the defense undertakes a lengthy, in-depth assessment of the "structure, history, and probable future" of the industry, 35/ the staff should be prepared to offer a rebuttal. However, if the standard for probable success on the merits is, as it is often described, a prima facie case, 36/ a showing of the requisite market share and concentration data should be sufficient. Such data are certainly enough to state a substantial claim on the merits.

32/ Cf. United States v. International Harvester Co., 564 F.2d 769, 773-74 (7th Cir. 1977), aff'g 1976-2 Trade Cas. ¶61,028 (N.D. Ill. 1976); United States v. Consolidated Foods Corp., 455 F. Supp. 108, 135-38 (E.D. Pa. 1978); United States v. Culbro Corp., 436 F. Supp. 746, 753 (S.D. N.Y. 1977); United States v. Amax, Inc., 402 F. Supp. 956, 970-74 (D. Conn. 1975).

33/ United States v. General Dynamics Corp., 415 U.S. 486, 498 (1974); United States v. Philadelphia National Bank, 374 U.S. 321 (1963); Brown Shoe Co. v. United States, 370 U.S. 294, 322 n.38 (1962).

34/ United States v. Citizens & Southern Nat'l Bank, 422 U.S. 86, 120 (1975). See United States v. Consolidated Foods Corp., 455 F. Supp. 108, 134-35 (D.C. Pa. 1978); United States v. Amax, Inc., 402 F. Supp. 956, 970 n.53 (D. Conn. 1975).

35/ United States v. General Dynamics Corp., 415 U.S. 486, 498 (1974).

36/ See, e.g., Wright & Miller § 2947 at 452 n.56; United States v. Crocker-Anglo National Bank, 223 F. Supp. 849, 859-61 (N.D. Cal. 1963).

(2) The Alternative Test

As discussed, infra, a showing by the government of probable success on the merits is arguably enough, without more, to justify the issuance of a preliminary injunction. However, where the government is unable to meet this standard, there is an alternative test that may still permit relief. The modern version can be traced to Judge Frank's seminal opinion in Hamilton Watch Co. v. Benrus Watch Co., 206 F.2d 738, 740 (2d Cir. 1953) (footnote omitted):

> To justify a temporary injunction it is not necessary that the plaintiff's right to a final decision, after a trial, be absolutely certain, wholely without doubt; if the other elements are present (i.e., the balance of hardships tips decidedly toward plaintiff), it will ordinarily be enough that plaintiff has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberate investigation.

Although this test has long been applied in and is primarily identified with the Second Circuit, the best recent statement of the test was established by the District of Columbia Circuit in Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 844 (D.C. Cir. 1978). The test has also been adopted by the Courts of Appeals of the Fourth, Sixth, Seventh, Eighth and Ninth Circuits, and district courts in the First and Fifth Circuits. 37/ The Third Circuit test, unlike the others, does not

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37/ Blackwelder Furniture Co. v. Seilig Mfg. Co., 550 F.2d 189, 194-95 (4th Cir. 1977); Roth v. Bank of the Commonwealth, 583 F.2d 527, 536-37 (6th Cir. 1978); Brandeis Mach. & Supply Corp. v. Barber-Greene Co., 503 F.2d 503, 505 (6th Cir. 1974); Mullis v. ARCO Petroleum Corp., 502 F.2d 290, 293 (7th Cir. 1974); Fennell v. Butler, 570 F.2d 263, 264 (8th Cir. 1978); William Inglis & Sons Baking Co. v. ITT Continental Baking Co., 526 F.2d 86 (9th Cir. 1975); Costando v. AAMCO Automatic Transmissions, Inc., 456 F.2d 941, 943 (9th Cir. 1972); Continental Oil Co. v. Frontier Refining Co., 338 F.2d 780, 781-82 (10th Cir. 1964); Cuneo Press of New England, Inc. v. Watson, 293 F. Supp. 122, 116 (D. Mass. 1968); and Pearl Brewing Co. v. Anheuser-Busch, Inc., 339 F.2d 945, 959 (S.D. Tex. 1972).

explicitly embrace the language of *Hamilton Watch*, but it is indistinguishable in substance. 38/

Insofar as the strength of the plaintiff's case is concerned, the "substantial question" or "fair ground for litigation" standard is clearly less demanding than the traditional test for likelihood of success on the merits and will almost certainly be satisfied in any case filed by the Division. The alternative test, however, may require a stronger showing on the equities than does the traditional "probable success" test. The "balance of hardships" must tip "decidedly toward plaintiff."

On the whole, the alternative test is not noticeably more lenient than the traditional version. Its special value is its recognition that the strength of the applicant's showing on the merits should be weighed against the strength of its showing on the other elements. 39/ The final equation depends on a "delicate balancing" of *all* the relevant factors. 40/

B. *Irreparable Injury*

Irreparable injury as a standard for granting preliminary injunctions serves several functions. Historically it derives from the quasi-jurisdictional requirement that equity may intervene only when there is no adequate remedy at law -- *i.e.*, when the alleged injury will not later be reparable by an award of damages. 41/ It has evolved in general equity practice into a somewhat broader measure of the adequacy of *any* subsequent remedy. 42/ Irreparability

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38/ Constructors Ass'n v. Kreps, 573 F.2d 811, 815 (3rd Cir. 1978); and Delaware River Port Authority v. Transamerican Trailer Transport, Inc., 501 F.2d 917, 923 (3rd Cir. 1974).

39/ *See, e.g.*, Blackwelder Furniture Co., *supra*, at 195; Delaware River Port Authority, Inc., *supra*, at 923; Canal Authority of Florida v. Callaway, 489 F.2d 567, 576 (5th Cir. 1974); Wright & Miller § 2947 at 455.

40/ Constructors Ass'n v. Kreps, *supra*, at 815; Metropolitan Detroit Plumbing & Mechanical Contractors Ass'n v. HEW, 418 F. Supp. 585, 586 (E.D. Mich. 1976), *quoted with approval in* Roth v. Bank of the Commonwealth, *supra*, at 53 37.

41/ *See, e.g.*, Wright & Miller § 2944.

42/ *See* Leubsdorf, The Standard for Preliminary Injunctions, 91 Harv. L. Rev. 526, 533-34 (1978).

is also an important factor to be weighed by the court in considering the relative harms and benefits that will flow from granting or denying preliminary relief.

Although courts have applied the traditional equity standards of irreparable injury to private actions brought under Section 7 of the Clayton Act, many have recognized that a different test is appropriate where the government seeks preliminary relief under the Act. A succession of cases has held that where the government shows a probability of success on the merits, it need not make a separate showing of irreparable injury. 43/

> A private plaintiff must show that hardship or damage will result to it, but where the United States is the plaintiff, as here, the United States is not required to prove public detriment from a merger which would violate the provisions of Section 7 . . . . The court below was not required to demonstrate the precise way in which violations of the law might result in injury to the public interest. It was sufficient to show, as did the court below, only that the "threatened act was within the declared prohibition of Congress." United States v. Ingersoll-Rand Co., 320 F.2d 509, 524 (3d Cir. 1963).

This doctrine is occasionally characterized as dispensing with the need for the government to prove irreparable injury, although it is perhaps more accurate to say that the necessary element of irremediable harm is implied as a matter of law from the threatened violation of the statute.

> [T]he threatened violation of the law here is itself sufficient public injury to justify the requested relief. The Congressional pronouncement in § 7 embodies the irreparable injury of violations of its provisions. No further showing need be made by those directed to enforce that section than that it is being violated or

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43/ United States v. Culbro Corp., 436 F. Supp. 746, 750 (S.D.N.Y. 1977); United States v. Atlantic Richfield Co., 297 F. Supp. 1061, 1074 n.21 (S.D.N.Y. 1969), *aff'd mem. sub nom.* Bartlett v. United States, 401 U.S. 986 (1971).

> threatened with violations. Nor is it necessary to demonstrate the precise manner in which violation of the law will result in injury to the public interest. It is sufficient to show only that an act or a threatened act is within the declared prohibition or [sic] Congress.
> United States v. Ingersoll-Rand Co., 218 F. Supp. 530, 544-54 (W.D. Pa.), *aff'd*, 320 F.2d 509 (3d Cir. 1963).

Several persuasive arguments can be made in support of such a distinction.

First, the "harm" or "injury" at issue must be defined in terms of threats to legally-protected rights and interests of the parties. 44/ The government as plaintiff, at least in Section 7 cases, has no private business or property interest at stake. It sues instead as sovereign to vindicate the public interest in a competitive, free-market economy; and that interest is violated and harm inflicted by definition whenever the statutory prohibition is violated. A potential violation, therefore, necessarily threatens impairment of protected interests.

> Defendants' argument that there has been no showing of irreparable injury to warrant a preliminary injunction is irrelevant. Sec. 7 of the Clayton Act expresses a Congressional proscription of such an acquisition where its effect "may be substantially to lessen competition, or to tend to create a monopoly." This proscription is a legislative declaration that an acquisition having such an effect is against the public interest. Government need not show that it will suffer irreparable damage *qua* Government, but only that there is a probability that it would prevail upon a trial on the merits.
> United States v. Chrysler Corp., 232 F. Supp. 651, 657 (D.N.J. 1964).

44/ Leubsdorf, *supra*, note 42, at 541.

That such injury is sufficiently irreparable to satisfy the traditional standard may be presumed from the intangible nature of the threatened harm; the uncertainty that the anticompetitive impact of even a temporary joinder of previously independent companies can ever, after the fact, be fully eliminated; the incipiency standard of the statute and the congressional mandate to prevent competitive injury; and the overriding importance of that policy.

> We start with the premise that the governmental policy stated in the antitrust laws is an overriding one; that the need to preserve that policy obviates any further showing of irreparable damage; and that if there is a reasonable probability that the Government will prevail on the merits we ought to preserve the status quo by an injunction.
> United States v. Crocker-Anglo National Bank, 223 F. Supp. 849, 850-51 (N.D. Cal. 1963).

> It is patent on the face of Section 7 that its purpose is to bar mergers which tend to lessen competition or tend to create a monopoly before they ripen into actuality. Consequently, hardship or injury to the public is not and cannot be a part of the Government's burden.
> United States v. Brown Shoe Co., 1956 Trade Cas. ¶68,244, at 71,114 (E.D. Mo. 1956) (footnote omitted).

This conclusion is also supported by the record of relief actually obtained. The primary alternative to preliminarily enjoining consummation of the proposed acquisition is reliance on subsequent divestiture of illegally acquired stock or assets. However, even when aided by the entry of a preliminary hold-separate order, divestiture has proven to be an inadequate remedy. In Pfunder, Plaine, & Whittemore, Compliance with Divestiture Orders Under Section 7 of the Clayton Act: An Analysis of the Relief Obtained, 17 Antitrust Bull. 19(1972), the authors studied 114 Section 7 cases in which divestiture was ordered. They concluded that "the results of compliance with Section 7 divestiture orders have been ineffective to achieve the goals of Section 7;" divestiture has proven an ineffective remedy "in a substantial number of cases;" and "[i]n most cases where preliminary injunctions were denied and divestiture was subsequently ordered, the divestiture which was ordered did not prove to be an adequate remedy." Id.

Divestiture has not been "an effective alternative to a preliminary injunction," id. at 120, for two reasons. (1) In most cases the illegally acquired company cannot be (or at least is not) re-established as a viable, independent competitor; its assets are generally retained by the acquiring company or sold, at least in part, to firms whose purchases create additional competitive problems. "[T]he most striking feature of compliance in Section 7 cases is the frequency with which seemingly anticompetitive corporate purchasers buy the assets ordered divested." Id. at 38 (footnote omitted, emphasis omitted). (2) Even in apparently successful divestiture cases, "the permanent damage to the market structure due to the temporary disappearance of competitive factors may be considerable." Id. at 117-18.

The problems were clearly recognized in the recent Report of the National Commission for the Review of Antitrust Laws and Procedures, which approved the practice of presuming the existence of irreparable injury on the basis of a showing of probable success on the merits.

> The practical problems of disentangling anticompetitive and illegal, yet consummated, mergers also deter courts from ordering effective structural relief. Assets are often "scrambled" once a merger has been consummated so that separating the acquired assets becomes an extremely difficult undertaking. Moreover, once a significant amount of time has elapsed after the acquisition, the assets may have changed in character. The assets may have been depleted by the acquiring company, or the management that had been part of the acquired company may be impossible to reassemble. Also, the market may have changed so that even if the original company could be restored to its original state, it might no longer be viable under the new market conditions.
>
> Often, there are strong incentives for the defendant to delay relief once the merger has been consummated. As long as the defendant has control of the acquired company, it may receive substantial benefits: access to the profits of the acquired company; use of the profits resulting from the combination of the assets of the acquired and acquiring company; benefits from the management of the

> acquired company; and opportunity to deplete the assets acquired. Furthermore, a consummated merger presents the court with the need to evaluate a viable, ongoing business. As in Section 2 cases, courts are frequently reluctant to disrupt an established business.
>
> Preliminary relief is the most effective way to avoid many of these pitfalls, since it stops commingling before it begins.
> National Commission Report at 125-26.

Many courts have also recognized the substantial problems involved in unscrambling an accomplished merger and reconstituting the acquired company as a viable competitive entity.

> I find it difficult to understand the defendant's contention that this case be allowed to go to a final hearing without injunction, and that if a violation of Sec. 7 has occurred that a remedy of divestiture then be effected. Considering the hardships of divestiture actions with their ramifications and complications and their painful impacts upon all whom they touch, it is hard to understand that such a device can be reasonably considered as the ultimate remedy to be employed here.
> United States v. Chrysler Corp., 232 F. Supp. 651, 658 (D.N.J. 1964).

> One may seriously doubt that the parties after years or after only a few months, will be able through divestiture to disintegrate so as to recreate or re-establish a status quo of all the companies and related matters as of the time of the granting of this preliminary injunction. For, no matter how well planned, and how carefully the composition of all its elements may be [sic] the decomposition no matter how well and thoroughly executed, must invariably leave inevitable changes.
> United States v. Ingersoll-Rand Co., 218 F. Supp. 530, 543 (W.D. Pa.), aff'd 320 F.2d 509 (3d Cir. 1963).

In sum "[d]ivestiture does not always turn out to be a feasible remedy and is never a painless one." Elco Corp. v. Microdot, Inc., 360 F. Supp. 741, 755 (D. Del. 1973). It "is usually fraught with difficulties and presents a whole range of problems which should be avoided if possible." United States v. Atlantic Richfield Co., 297 F. Supp. 1061, 1074 (S.D.N.Y. 1969), aff'd mem. sub nom. Bartlett v. United States, 401 U.S. 96 (1971).

It is also important to note that the presumption of irreparable injury is not a doctrinal innovation peculiar to the antitrust laws. The same rule is commonly applied where other important statutorily-declared public policies are involved. See, e.g., United States v. Spectro Foods Corp., 544 F.2d 1175, 1181 (3d Cir. 1976) (Federal Food, Drug & Cosmetic Act) and SEC v. Globus International, Ltd., 320 F. Supp. 158, 160 (S.D.N.Y. 1970) (Securities Act of 1933 and Securities Exchange Act of 1934).

Perhaps the most important parallel is found in the judicial interpretation of 15 U.S.C. § 53(b) that specifically authorizes the FTC to obtain preliminary relief in merger cases. Until the 1973 amendment, the FTC had no statutory authority to obtain preliminary relief except against false or misleading food, drug, or cosmetic advertising under 15 U.S.C. § 53(a). The only way it could gain an injunction in merger cases was by applying to the Court of Appeals pursuant to the All Writs Act and showing that "an effective remedial order, once the merger was implemented, would otherwise be virtually impossible, thus rendering the enforcement of any final decree of divestiture futile." FTC v. Dean Foods Co., 384 U.S. 597, 605 (1966).

The amended statute now provides that a preliminary injunction may be granted by a district court "[u]pon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest." This amendment was intended to establish essentially the "presumed irreparable injury" standard applied by the courts in Section 7 cases brought by the Department of Justice.

> The intent [of the amendment] is to maintain the statutory or "public interest" standard which is now applicable, and not to impose the traditional "equity" standard of irreparable damage, probability of success on the merits, and that the balance of

> equities favors the petitioner. This latter standard derives from common law and is appropriate for litigation between private parties. It is not, however, appropriate for the implementation of a Federal statute by an independent regulatory agency where the standards of the public interest measure the propriety and the need for injunctive relief.
>
> Conference Comm. Rep. No. 93-924, 93d Cong., 1st Sess. 1973, reprinted in U.S. Code Cong. & Ad. News 2523, 2533 (1973) (emphasis in original).

The courts, in applying the statutory standard, have given it the liberal interpretation intended by Congress. See FTC v. Atlantic Richfield Co., 549 F.2d 289 (4th Cir. 1977), and FTC v. Rhinechem Corp., 459 F. Supp. 785 (N.D. Ill. 1978).

In light of the concurrent jurisdiction of the Department of Justice and the FTC to enforce Section 7 of the Clayton Act, the Division can make a powerful argument that the authority of the Department of Justice to seek preliminary relief under 15 U.S.C. § 25 should be interpreted in a manner consistent with 15 U.S.C. § 53(b).

The distinction between the burdens of the government and private plaintiffs is also consistent with the very different language employed by Congress in those sections of the statute authorizing preliminary relief. Section 16 of the Clayton Act, 15 U.S.C. § 26, provides that a private plaintiff may obtain a preliminary injunction "when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damages is granted by courts of equity," including "a showing that the danger of irreparable loss or damage is immediate."

By contrast, Section 15 of the Clayton Act, 15 U.S.C. § 25, contains no such limitations. Preliminary injunctive relief is not considered an extraordinary remedy as it often is in private litigation.

> The failure of Congress to require that the Government show irreparable loss on an application for a preliminary injunction in a Section 7 action, as is the case with a private plaintiff, 15 U.S.C. § 26, indicated the Congressional desire to lighten the burden generally imposed on an applicant for preliminary injunctive relief.
> _United States_ v. _Atlantic-Richfield Co._, 297 F. Supp. 1061, 1074 n.21 (S.D.N.Y. 1969), _aff'd mem. sub nom._ _Bartlett_ v. _United States_, 401 U.S. 986 (1971).

If the Division establishes probable success on the merits, there is, by definition, a reasonable probability that the transaction will at some point in the future substantially impair competition. Having proved this much, it may be argued, the government should not be assigned the unrealistic burden of proving the time, manner, and irreparable nature of the harm with the precision assumed by the traditional test. Public policy considerations dictate that the probable injury be considered necessarily irreparable.

This is, admittedly, the rationale underlying the statutory presumption of irreparable injury. Where a judge initially rejects the presumption as formal doctrine, the staff may wish to make the same arguments in the context of the facts of the particular case.

This factual basis may be demonstrated if the proposed transaction threatens irreversibly to injure competition because: (1) the businesses cannot be fully reconstituted as separate, viable competitive entities; (2) the quality of competition in the market will be adversely affected during the pendency of the case, and this impact cannot be adequately redressed by post-trial relief; or (3) even a temporary joinder that is later reversed will have a long-term anticompetitive impact that cannot be prevented by post-trial relief. In practice, it is virtually impossible to predict all potential anticompetitive effects with precision.

Injury to the competitive process (as opposed to injury to particular competitors, customers, or suppliers, which may not be the same) is likely to be subtle, gradual, often unrecognizable even after the fact. "[T]he fact that no concrete anticompetitive symptoms have occurred does not itself imply that competition has not already been affected, 'for once the two companies are united no one knows what the fate of the acquired company and its competitors would have been but for the merger.'" United States v. General Dynamics Corp., 415 U.S. 486, 505 (1974), quoting from FTC v. Consolidated Foods Corp. 380 U.S. 592, 598 (1965). Remedial adequacy is almost entirely a matter of speculation. The essential issue is who should be forced to bear the risk of this uncertainty.

The most demonstrable risks involve the efficacy of subsequent divestiture, and the maximum relief obtainable in these situations is likely to be a carefully tailored hold-separate order designed to neutralize only the most obvious problems.

C. Balancing the Equities

Although most of the courts that have followed the Ingersoll-Rand position on irreparable injury have also weighed the relative hardships, it does not follow that the private injuries claimed by the defendants should be given the same weight in a government action as they would in a private suit.

As the recent line of cases interpreting 15 U.S.C. § 53(b) makes clear, the equities to be weighed are principally the benefit or harm to the public interest that would flow from an injunction delaying a proposed merger. The private injuries to stockholders and others resulting from an injunction, which are invariably and passionately urged on the court as being adequate grounds for denying an injunction, should be given little weight. See FTC v. Food Town Stores, Inc., 539 F.2d 1339, 1345-46 (4th Cir. 1976).

Many courts have taken a similar "public interest" approach in cases brought by the Department of Justice. *United States* v. *Atlantic Richfield Co.*, 297 F. Supp. 1061, 1073-74 (S.D.N.Y. 1969), *aff'd mem. sub nom. Bartlett* v. *United States*, 401 U.S. 986 (1971). *United States* v. *White Consolidated Industries, Inc.*, 323 F. Supp. 1397, 1399-1400 (N.D. Ohio 1971). *See also United States* v. *Pennzoil Co.*, 252 F. Supp. 962, 986 (W.D. Pa. 1965) (a showing of injury to the defendant "must be so proportionately persuasive as to submerge the principle that '[t]he status of public interest and not the requirements of private litigation measure the propriety and need for relief'"); *United States* v. *Chrysler Corp.*, 232 F. Supp. 651, 659 (D.N.J. 1964).

It should be stressed that the only benefits of a merger properly cognizable by a court under Section 7 are its procompetitive results, if any. These are relevant insofar as they suggest that the merger will not tend substantially to lessen competition. No other concerns are cognizable under the statute. *FTC* v. *Procter & Gamble Co.*, 386 U.S. 568, 580 (1967); *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 371 (1963); *see, e.g.*, *Ford Motor Co.* v. *United States*, 405 U.S. 562, 569-70 (1972). *Cf. National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 695-96 (1978); *United States* v. *Bethlehem Steel Corp.*, 168 F. Supp. 576, 617 (S.D.N.Y. 1958). It seems appropriate that the equities the court may recognize be limited to factors within the scope of the underlying statute.

Even if they acknowledge that the law requires it, it is difficult for most judges to ignore private equities. Injuries to persons associated with the transaction, if it is delayed, tend to be concrete, immediate, and intuitively easy for the court to appreciate. By comparison, injuries to competition are remote and abstract. To combat this natural tendency, the Division should attempt to "personalize" the transaction's potential anticompetitive impact. Where a substantial probability of success on the merits has been established, it may also be helpful to point out that the private benefits delayed or foregone flow from a probably unlawful transaction, and if considered at all, they should be discounted by the government's likelihood of success on the merits.

A similar problem arises if the judge has accepted the statutory presumption of irreparable injury as a matter of law, but is not convinced that it accurately reflects the facts of the case before him. A failure to demonstrate irreparable injury may be equated with the absence of any public equities favoring preliminary relief. This inconsistency always should be pointed out to the court. In addition, the judgment of real, irremediable harm implicit in the presumption should be emphasized.

D. Public Interest

The presumption of irreparable injury and the primacy of public as against private equities in government cases are dictated by considerations of public interest. See Yakus v. United States, 321 U.S. 414, 441 (1944) and United States v. First National City Bank, 379 U.S. 378, 383 (1965); Gulf & Western Industries, Inc. v. Great A&P Tea Co., 476 F.2d 687, 699 (2d Cir. 1973).

E. Other Equitable Considerations

Despite the widespread recognition that a government request for preliminary relief is subject to different rules than apply in purely private litigation, it remains an equity proceeding. Among the equity issues for which Division attorneys should be prepared are the following.

1. Maintenance of the Status Quo and Mandatory Injunctions

The goal of preliminary relief is often described as maintenance of the status quo, and that objective is occasionally advanced as its only premissible function. A related maxim holds that a mandatory injunction is disfavored, especially at the preliminary stage, and can be issued, if at all, only on a stronger showing than would be required for a prohibitory injunction.

In a merger case, where an order is sought prospectively to enjoin consummation, both conditions are satisfied. However, if relief is sought following completion of a merger or against continuation of a practice alleged to be illegal under the Sherman Act, it may be opposed as a mandatory injunction and a disruption of the status quo.

Experience has shown that these objections can be rebutted. Both concepts are highly ambiguous. The status quo is an imprecise concept, and virtually any action can be commanded in the negative. The maxims are historically dubious, often disregarded, and frequently criticized. See, e.g., Wright & Miller § 2947 at 46. Some of the criticism has been quite strong, see, e.g., Leubsdorf, supra, at 546. Most critics have emphasized that neither maintenance of the status quo nor a preference for prohibitory injunctions is necessarily consistent with the true rationale for preliminary relief -- preservation of the court's power to render a meaningful decision on the merits. See, e.g., Canal Authority of Florida v. Callaway, 489 F.2d 567, 576 (5th Cir. 1974).

2. Reluctance to Give Complete Relief

It is often argued that a preliminary injunction should not give the plaintiff all the relief he could expect after a trial on the merits. The courts' reluctance to do more than is absolutely necessary at a preliminary stage is understandable. It makes sense, however, only where there are independent grounds for denying relief. Wright & Miller, § 2948 at 447; Developments in the Law -- Injunctions, supra, at 1058.

In merger cases this principle is often cited by defendants where an injunction might lead to abandonment of the transaction, thus giving the government a victory by default. See, e.g., United States v. Atlantic Richfield Co., 297 F. Supp. 1061, 1073 (S.D.N.Y. 1969), aff'd mem. sub nom. Bartlett v. United States, 401 U.S. 986 (1971). In addition to the intrinsic unsoundness of this proposition as a rule of equity, it may be criticized as inappropriate both because the claimed injury is private rather than public and because it is self-inflicted. FTC v. Rhinechem Corp., 459 F. Supp. 785, 791 (N.D. Ill. 1978).

3. Delay

Delay on the part of the party seeking preliminary relief has traditionally been a factor in the court's decision to grant or withhold such relief. See Wright & Miller, § 2946 at 417-22. It has been asserted as a reason for denying preliminary injunctive relief in both government and private antitrust cases. See e.g., United States v. Columbia Pictures Corp., 169 F. Supp. 888, 897-98 (S.D.N.Y. 1959).

Because of the critical importance of the public policies involved and the need to protect the public interest, delay should not be a factor in assessing the government's right to preliminary relief under Section 7. See ITT v. General Telephone & Electronics Corp., 518 F.2d 913, 928-29 (9th Cir. 1975) (distinguishing between private suits for injunctive relief under 15 U.S.C. § 26, to which it held the defense of laches applicable, and government actions pursuant to 15 U.S.C. § 25, to which the court implied it would not apply); United States v. Pennsalt Chemicals Corp., 262 F. Supp. 101, 101 (E.D. Pa. 1967) ("The defendant here concedes that laches is not a defense to the action, but argues that it is a defense to some forms of relief sought, e.g., divestiture. But the authorities are to the contrary.").

There are other problems with the invocation of delay as a reason for denying preliminary injunctive relief in government cases. One is that the decision to sue, and the marshaling of sufficient evidence to make a prima facie case, require more time on the part of the government than private plaintiffs. Private plaintiffs can react to a threatened takeover immediately, without considering the merits of the case as a matter of public policy. The government is expected to, and should, make a more careful and objective determination of the desirability of challenging a merger. Unlike the usual private plaintiff, the government does not begin with an intimate knowledge of the industry and the facts surrounding the acquisition. Information gathering is essential, and while it can be done expeditiously, it cannot be done instantaneously.

A policy that penalizes the government for seeking relief at the eleventh hour, without considering whether it would be realistic or desirable as a matter of policy to require an earlier decision, is itself inequitable. It would encourage the premature filing of ill-considered cases on insufficient facts -- a result justifying more significant objections from defendants and courts alike. Furthermore, given the relatively short time span between filing and the preliminary injunction hearing, and the fact that such hearings are effectively, and often formally, the ultimate trial on the merits, a contrary policy would place the government in the dilemma of choosing between inadequate discovery and preparation (as the price for seeking preliminary relief) and inadequate relief following a plenary trial on the merits. The dilemma intensifies as the legal and factual issues involved become more complex.

Of course these considerations do not justify unnecessary delay by the government, and as a matter of both policy and tactics, the staff should prepare its case as expeditiously as practicable. Whether warranted or not, many courts view with disfavor requests for emergency relief made only days before a scheduled closing when the government was aware of the merger or acquisition weeks or months in advance. Prudence and responsible prosecutional policy dictate that if a case can be filed and a motion for preliminary relief argued well in advance of the merger, it should be done; however, given the timing of mergers under the premerger notification rules, this is rarely possible. The staff should take pains to inform the court that it has exercised due diligence and proceeded with all possible dispatch in those situations. This may be held against the government without regard to the length of the "delay," the reasons for it, or whether or not it was avoidable. See United States v. Tracinda Investment Corp., 1979-1 Trade Cas. ¶62,445 at 76,624-25 (C.D. Cal.); United States v. Culbro Corp., 436 F. Supp. 746, 758-59 (S.D.N.Y. 1977).

F. Practical Problems and Procedures

Speed of preparation is essential in applying for preliminary relief. When faced with an impending merger or acquisition, most efforts will, of necessity, be directed at fact gathering. There will be little time for legal research and analysis. It is therefore recommended that the Exemplar File be consulted, as well as specific briefs and pleadings relating to TRO's and preliminary injunctions that can be obtained from the Legal Procedure Unit. The legal analysis set forth in this section, *supra*, is also helpful in developing a quick and usable analysis of the applicable standards.

1. Pleadings and Briefs

When it first appears that a request for preliminary relief may be necessary, a member of the staff should be assigned to do the legal research and prepare pleadings and other papers. The following will commonly be required: (1) summons and verified complaint; (2) application or petition for a temporary restraining order and preliminary injunction; (3) notice of hearing; (4) a proposed restraining order; (5) brief in support; (6) supporting affidavits; and (7) a certificate of service.

If parties or potential witnesses cannot be served within the district or within 100 miles of the court, applications and proposed orders for service of summons or subpoenas pursuant to Section 15 of the Clayton Act, 15 U.S.C. § 25, must also be prepared.

A variety of additional pleadings, such as statements of issues and contentions, proposed stipulations, and proposed findings of fact and conclusions of law also may be called for in the course of the proceedings.

The application for a temporary restraining order and preliminary injunction can be drafted as a single document or as two separate petitions. The latter is common practice in the Division. The application(s) should state: (1) the statutory authority relied on; (2) relevant background information about the proposed transaction; (3) that the proposed transaction will occur on a given date unless restrained; (4) that a verified complaint has been filed alleging the proposed transaction violates the relevant statute (usually Section 7 of the Clayton Act); (5) that a temporary restraining order is necessary to permit a hearing on the request for a preliminary injunction, and a preliminary injunction is necessary to prevent a violation of the statute and to protect the public interest; (6) that a brief and affidavits have been filed in support of the motion; (7) that the defendants have been notified of the filing of the application for a temporary restraining order; and (8) the nature of the relief sought.

The notice of hearing on the motion for a preliminary injunction should be prepared with the dates left blank, to be filled in when a date is set down by the court after ruling on the TRO. A blank copy may be filed with the other pleadings, or the hearing may originally be noticed for a date certain, based on the local rules concerning motion practice (and the judge's motion calendar if the judge to whom the case will be or has been assigned is known). This may be done with the expectation that the judge, in issuing the TRO, will provide for an expedited hearing. A notice is unnecessary if the preliminary injunction hearing is brought on by order to show cause rather than as a motion.

The staff must submit a proposed TRO. A proposed preliminary injunction may also be offered for filing at the same time, but, in most cases, this would be premature. The better practice is to draft the injunction following the hearing, in response to the court's opinion. A proposed injunction drawn and filed at a too early stage of the proceedings is at best a waste of time and may not even be accepted for filing (except perhaps as an attachment to the application for a preliminary injunction).

The proposed TRO should conform to the requirements of Rule 65(b) and (d) and, equally important, local rules and practice. It should recite: (1) the court's authority to issue the order; (2) the fact that a complaint has been filed alleging a violation of Section 7 or other statute and a preliminary injunction has been sought; (3) the transaction, if not restrained, will occur before a hearing can be held; (4) the materials relied on to support the order (brief, affidavits, etc.); (5) the facts and conclusions justifying issuance of the order (it is preferable that the court file an opinion stating the reasons for issuing the order. Rule 65, and simple prudence, suggest that some reference be made to substantive issues raised on the merits and irreparable injury); and (6) the operative terms of the proposed order. It should be directed at the defendants, "their officers, agents, servants, employees, and attorneys" and "persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise." It should specify the date of the preliminary injunction hearing, the duration of the order, with provision for renewal, and the time and place of issuance.

The lead attorney's affidavit should verify the complaint, identify and authenticate important documents (which should be attached to the affidavit) and other exhibits (such as affidavits and depositions), detail the notice given the defendants of the application for a restraining order, and comply with any other procedural requirements (e.g., a statement that no similar relief has been previously requested). It is desirable that the affidavit also explain the sequence of events leading up to the filing of the case in order to demonstrate due diligence and lack of unnecessary delay in seeking relief.

If there is an economist who is prepared to testify at the initial hearing, he or she should prepare an affidavit containing a compilation of important market data and whatever additional information or conclusions would, in the given case, be helpful and appropriate.

Every effort should be made to obtain supporting affidavits from third parties. Some courts require a great deal of evidence before granting a TRO. It is better to err on the side of too much evidence rather than too little. If there is time during the investigation; CID depositions are useful since their evidentiary value usually is superior to affidavits. They are virtually the only means of getting admissions from the defendants at this stage, and they help to bind them to their testimony.

Before beginning to draft the necessary papers, the staff should closely examine the local rules of the district where the action will be filed. It is good practice to provide a copy of the local rules to every member of the staff. The staff also should contact the Division field office or United States Attorney's office and arrange to have a liaison person assigned to the case. This person should be consulted on all questions of form and procedure. Customs and practices in the district can greatly affect the manner in which the papers should be drawn and the matter presented for hearing. It will often be desirable for the liaison person to accompany the staff to court. Generally, a local attorney must be designated upon whom papers can be served. Although most defendants will serve their papers on the trial staff, this cannot always be assured. In addition, there may also be delays resulting from service of orders and notices issued by the court, which often are sent to the local U.S. Attorney's Office. The staff should make arrangements for speedy notification and transmission of papers served on a local office, preferably by having them routed directly to a designated liaison person rather than the U.S. Attorney.

The logistical problems involved are significant when the case is filed in a distant forum. Someone in the staff's section or field office should arrange for travel and hotel reservations. Procedures should be worked out for temporary offices, automated typing equipment, FTS telephone lines, and duplicating machines (preferably exclusively for staff use) at all hours, and for local secretaries on an emergency basis.

If the U.S. Attorney's Office or Division field office has an office manager or administrative assistant, it will be important to develop a good working relationship with that person. It is also desirable that the staff keep the field office Chief or U.S. Attorney informed of the progress of the case.

2. Filing and Hearing Procedures

The usual procedure where a TRO is sought will begin by filing the complaint and accompanying papers in the Clerk's Office. The application for a temporary restraining order will then be presented to the judge assigned to the case and copies should be served on the defendants. The court may or may not wish to receive copies of pleadings filed with the Clerk's Office. Defendants commonly appear in opposition to TRO's sought by the Division. The proceedings may be conducted in open court or in chambers. The parties have the right to insist that they be on the record. If the judge to whom the case is assigned is unavailable, the application can be presented to the miscellaneous or emergency judge.

The procedure will obviously be different if the case is filed sufficiently far in advance of the proposed transaction to permit the application for a preliminary injunction to be brought on as a regular motion. This will not often be possible, given the usual time constraints, unless the defendants voluntarily agree to postpone the transaction pending the outcome of a hearing. Another variation (primarily in the papers, not the procedure) will occur if the preferred practice in the district is for the TRO to include an order to show cause why a preliminary injunction should not issue. This should be determined well in advance.

If a restraining order is granted, the court will put the matter down for hearing within a matter of days. Because there will be little time to gather additional evidence, because the trial on the merits may be consolidated with the preliminary injunction hearing, and because the hearing may effectively dispose of the case one way or the other even if the trial is not advanced, the staff should be prepared to try the entire case almost immediately upon filing. This requires, among other things, intensive pre-filing discovery. Staff should not assume that it will have the opportunity at a later point to fill in gaps in the evidence -- it may not.

Staff should impress upon reluctant affiants or deponents, for example, that if they do not come forward at this stage, there may be no second chance. Note also that this process makes document control exceedingly important. One person should be assigned this task, and should be responsible for organizing and transporting documents for use at the hearing. It also emphasizes the need for adequate staffing. An economist should be involved early and intimately in preparing the case.

There are strong pressures on all parties, including the judge, to complete the hearing as quickly as possible. In order not to test the limits of either the permissible duration of a TRO or the judge's patience, and in view of the fact that the government is insisting by the very act of seeking preliminary relief that the matter is urgent, it is incumbent on the trial staff to ruthlessly pare and streamline its case. Indulging the usual luxury of putting into evidence every scrap of remotely relevant evidence will quickly alienate most judges. Having substantially interfered with the proposed transaction at our behest, the judge will expect, as a minimum quid pro quo, an expeditious presentation of the government's case.

The court will likely insist that the parties stipulate to as many facts as possible, and if the court does not do so, the trial staff should take the initiative and offer proposed stipulations. The original affidavits presented with the TRO application can be considered by the court in deciding whether to issue a preliminary injunction. It may be possible, to expedite the presentation of evidence, for witnesses to adopt their affidavits, either those given previously and submitted with the TRO application or affidavits prepared especially for the preliminary injunction hearing (and served on the defendants in advance of the hearing), at the outset of their testimony. This still permits cross examination on the subject matter of the affidavits but economizes on trial time. The same practice may be followed for depositions.

The sometimes awesome speed of the procedure, at least as measured in antitrust terms, can be both advantageous and disadvantageous to the government. On the one hand, the fast pace helps the plaintiff maintain the initiative. On the other hand, where essential data has been difficult to obtain and areas of the case requires additional discovery, the fast pace works to the defendants' advantage. Where the needed information has been withheld by the defendants, there is a strong case for conditioning a speedy hearing on an equally speedy disclosure by defendants of the information. A similar case may be made where the government has proceeded with all due diligence but has been unable to discover essential facts. Where appropriate, a motion to compel discovery or compliance with an outstanding CID or with the pre-merger notification rules (where the response has been inadequate) on an expedited basis might accompany the request for a TRO.

In deciding whether to recommend that the Division seek preliminary relief, the staff should consider: (1) the strength and complexity of our case on the merits; (2) the magnitude of the probable injury to competition from the merger or acquisition, how quickly it is likely to occur, and the extent to which, absent preliminary relief, it can be reversed or forestalled after a trial on the merits (including the practicability and efficacy of divestiture); (3) the amount of harm to public and private interests that the defendants will be able to claim; (4) how far advanced preparation of the case will be at the time of filing; and (5) any special problems or advantages (logistical considerations, the necessity for an unusual form of relief, such as a mandatory injunction upsetting the current status quo, etc.). As a general rule in Section 7 cases, the presumption should be in favor of seeking preliminary relief, given the fact that in its absence final relief is almost certain to be less effective than if some form of interlocutory injunction has been entered. Preliminary relief also provides the defendants and the court with a powerful incentive to try the case expeditiously, while without it, the incentives, at least for defendants, will favor delay.

3. Hold Separate Orders

A more difficult decision concerns the type of preliminary relief to be requested. In the usual Section 7 case the choices are essentially three: to seek a complete prohibition of the merger or acquisition, contending that a hold-separate order would be inadequate; to seek a complete prohibition but also, in the alternative, a hold-separate order; or to recognize that a total prohibition is unnecessary or unlikely to be obtained and request only some form of hold-separate order.

Although hold-separate orders are often distinguished from preliminary injunctions, by which is commonly meant an absolute prohibition on consummation of the acquisition or merger, they are in fact merely a species of preliminary injunction. Tactically, the decision as to the type of relief requested is extremely important because the courts tend to seek a middle ground. If the government implies that a hold-separate order may be adequate, the chances of obtaining a complete prohibition on consummation of the transaction are greatly reduced.

On the other hand, if the government refuses to admit that a hold-separate order could be adequate relief, even as a less desirable alternative to that sought, it may be faced with an inadequate order drawn by a judge who has been given little help in its formulation, or the complete denial of relief by a judge who, if the question had been directly addressed, would have issued a hold-separate order.

Substantively, hold-separate orders are least likely to be satisfactory when the takeover is a friendly one, unopposed by the target company; when it involves direct competitors; when it involves total acquisitions; and when there are plans to merge some or all of the operations of the companies. Conversely hold-separate orders may be adequate where the management of the acquired company opposes the takeover; where the acquisition is conglomerate or vertical; where the acquisition is only partial and has some indirect aspects (such as the acquisition of debt or debentures that may be convertible on specified contingencies); and where the ownership will be united in a holding company but the operations of the acquired company are expected to be maintained entirely separate from those of the acquiring company.

A sample hold separate order is found in the Exemplar File as Exemplar No. 160.

* * *

This section on obtaining preliminary relief should aid the staff in determining the legal requirements of obtaining a TRO or preliminary injunction. The practical suggestions advanced are intended to provide a checklist of necessary items at the time of filing the papers and arguing the matter. The most significant fact remains the short space of time available to the staff in completing the procedure; accordingly, the full preparation of all materials prior to the proceeding is essential.

III. Discovery Under the Federal Rules of Civil Procedure

After the filing of the complaint, discovery should begin at the earliest time possible. With the investigatory powers available to the Antitrust Division under the amendments to the Antitrust Civil Process Act and the pre-merger notification procedures established by the Antitrust Improvements Act of 1976, the Division has substantial pre-filing investigatory tools to develop its case during the investigation. While these tools are of great assistance in developing the case, discovery is still a necessary element in case development. To expedite the case, Antitrust Division staffs should use the pre-trial discovery procedures chiefly to isolate and narrow the issues of the litigation. This does not limit the use of pre-trial discovery tools in civil litigation, it will focus their use.

Antitrust Division staffs conducting discovery in civil litigation may find the following practices helpful.

A. Planning Discovery

Division staffs should carefully establish a cohesive plan by which discovery will be conducted. An outline of the types of materials required, the depositions necessary, and the scheduling of Division resources is essential to any responsible plan of litigation. The Division should also attempt to narrow and limit the issues of the case through the use of discovery procedures.

In civil actions, the Division should have developed some theory of relief by the time it files its case. Generally, the Division's trial staffs and economists should evaluate the potential benefits that may result from the filing of the suit, either structural or behaviorial.

In civil litigation, the staff's discovery plan should be developed and presented to the Court at the early stages of the proceedings. An early pre-trial conference should be requested to establish a discovery schedule, initiate stipulation discussions, and begin to limit and narrow the issues. This pre-trial conference should be based on a predetermined agenda or set of topics, and should set the tone for an efficient and comprehensive litigation schedule. At this conference, the staff usually should be prepared to submit a comprehensive outline of its discovery schedule and other issues for the court to consider.

Under the Federal Rules, the staff may obtain, and be asked to provide, discovery through the use of interrogatories, requests to produce documentary materials, requests for admissions, and depositions. Each of these discovery tools will be employed consistent with the Federal Rules and the Court's instructions. The following is a brief description of some practical considerations that might arise during the discovery period.

B. Use of Depositions

Depositions are often the most useful means of conducting pre-trial discovery. If properly employed, depositions can narrow the issues of the case, expedite agreements and stipulations between the parties, authenticate documents, and shorten the amount of trial time required for the case.

This section is not intended as a comprehensive statement of the legal analysis, or techniques of conducting depositions, since there are many valuable texts that provide Division attorneys with that information. See C. Wright and A. Miller, Federal Practice and Procedure §§ 2001 et seq. and 4 Moore's Federal Practice and 4A Moore's Federal Practice. This section is intended only to suggest general methods and suggestions that have been employed successfully by Division attorneys in the past.

1. Applicable Federal Rules of Civil Procedure

During the preparation and taking of depositions, staff should be familiar with Rules 26 to 32 of the Federal Rules of Civil Procedure, as well as the sanctions provisions of Rule 37 and the evidentiary and subpoena provisions of Rules 43 and 45, respectively. Staff should consult the relevant sections of such texts as Wright & Miller and Moore's Federal Practice, in determining how to prepare and conduct depositions.

2. Purpose of Depositions

Under Rule 26, depositions may be taken for use as evidence at trial or for discovery. As a discovery tool, a deposition may be used to find facts that relate to the claim or a defense of a party taking the deposition. Depositions of party opponents, and in some circumstances, of non-party witnesses may be admissible as substantive evidence at trial. See Rules 801(d)(2) and 804(b)(1) of the Federal Rules of Evidence.

Under certain circumstances, it may be advisable to take the depositions of witnesses residing more than 100 miles from the place of the trial. Although the Court, in its discretion, may refuse to issue trial subpoenas to witnesses residing more than 100 miles from the place of trial, this situation is uncommon in cases brought by the Division. See Fed. R. Civ. P. 45(e); 15 U.S.C. § 23. The staff should ascertain whether there is any possibility the Court may employ this procedure, and, out of an abundance of caution, may find the deposition procedure to be the best available means of obtaining and preserving the testimony for possible trial use.

The deposition of any witness may be used for impeachment purposes at trial. For other procedures involving the use of depositions as evidence at trial, see Section B(10), infra.

3. Persons Whose Depositions May Be Taken

a. Requirements Under the Rules

Under Rule 26, any party may take the testimony of any person, including a party, by deposition. This includes corporations, partnerships, and other associations, as well as individuals.

Under Rule 30(b), a notice and accompanying subpoena may name a corporation, partnership or association as a deponent and describe, with reasonable particularly, the materials on which examination is required.

Rule 30(b) provides that reasonable notice of the taking of the deposition be given to every other party. The notice must set forth the time and place of the taking of the deposition, the name and address of each person to be examined, if known, or, if the name is not known, a general description to identify the particular class or group of persons to which he or she belongs. A party may then name as a deponent a corporation, partnership, association or government agency and describe with reasonable particularity the matters upon which examination is requested. The organization must then designate one or more of its officers, directors, or managing agents or other persons to testify on its behalf and may set forth the matters on which that person will testify. A subpoena to a non-party corporation, partnership, association or governmental entity must advise that party of a duty to make such a delegation. See Rule 30(b)(6).

b. Practical Considerations

When the Division decides to take the depositions of certain individuals or representatives of corporations, it should give adequate advance notice to all parties to the action. It is good practice to inform the witness or his attorney of the tentative date of the deposition prior to filing of notice and serving the subpoena. When practicable, efforts should be made to interview the witness in advance of this testimony. Where the staff also contemplates requiring documents from the deponent by means of a subpoena duces tecum, it should allow the deponent adequate time to assemble the materials.

Notice of the taking of a deposition should be filed in the jurisdiction where the case is pending and in the jurisdiction where the deposition will be taken. The local rules in many districts do not allow the issuance of a deposition subpoena until such time as the clerk of the district court in the jurisdiction where the case is pending receives a certified copy of a notice.

If a subpoena duces tecum is to be served on a third party, a list of the materials to be produced, as set forth in the subpoena, must be attached to, or included in, the notice. See Fed. R. Civ. P. 30(b). If the notice is to a party deponent, it may be accompanied by a request for production of documents under Rule 34 at the time of the taking of the deposition. Rule 34 document requests may be served without leave of the court upon any party after service of summons and complaint in the case. See III (D), infra.

4. Place of Deposition

a. Requirements Under the Rules

Depositions may be taken wherever convenient to the parties and the witnesses. Within certain limitations, decisions on such matters must be made by the party desiring to take the deposition. See Rule 45(d)(2). The witness or other party may request the court under Rule 36(c) to change the time and place for good cause shown.

b. Practical Considerations

Prior to the time of the deposition, the Division staff should make arrangements for adequate space for the taking of the deposition, the presence of an officer authorized to administer oaths, and a court reporter to record testimony (often the court reporter is a designated officer who can administer oaths).

The United States Attorney in the district in which the deposition is to be taken, or the Antitrust Division field office, if one is found in that district, are usually accommodating in making arrangements for the taking of depositions. In addition, the U.S. Attorney's staff or field office Chief can provide the staff with advice as to the local practice for taking depositions.

5. Presiding Officer at the Deposition

a. Requirements Under the Rules

Under Rule 28, depositions taken within the United States will be taken before an officer authorized to administer oaths by the laws of the United States, and the place where the examination is held, or before a person appointed by the court where the action is pending. The person so appointed may administer oaths and take testimony.

b. Practical Considerations

Where practicable, the court reporter should be qualified to administer oaths in these matters. In arranging for court reporting services, the staff should consult Division Directive ATR 2750.1, "Utilization of Court Reporter Services."

6. Requiring the Presence of Witnesses

All witnesses, other than parties to the action, must be subpoenaed. Parties may also be subpoenaed, as a matter of caution, although Rule 37(d) provides that willful failure of parties to appear authorizes the court, on motion, to strike the pleadings of that party or to take other punitive action. Subpoena duces tecum may also be served upon nonparties and Rule 34 document requests may be employed in obtaining documents from parties. See Section III(D), infra.

7. Taking the Deposition

Once the witness is sworn and counsel's appearances are noted for the record, the following procedures are suggested in the conduct of the deposition.

a. Waiver of Formalities

It is suggested that at the beginning of a deposition the parties stipulate among themselves to waive certain of the formalities provided for by the Rules that do not appear to be necessary. Rule 29 authorizes the parties to agree among themselves, by written stipulation, that depositions may be taken before any person, at any time or place, upon any notice, and in any manner, and that, when so taken, such depositions may be used as depositions taken in strict observance of the rules. The requirement that stipulations be in writing is met by having them recorded in the transcription of the deposition.

Rule 30(e) permits the waiver of the requirement that the deponent read and sign the deposition. A stipulated waiver covering the completion and return of the deposition transcript is permitted by Rule 32(d)(4), which provides that errors and irregularities in the transcription of the testimony or the manner in which the deposition is prepared, signed, certified, sealed, indorsed, transmitted, or filed by the presiding officer are waived unless a motion to suppress the deposition is made promptly after any such defect is found.

Although the rules provide that many defects in deposition procedures are automatically waived unless a timely objection is made, it is desirable for the clarity of the record and for trial preparation purposes to eliminate in advance of trial all possible objections related to formalities. It is suggested that stipulations waiving such deposition formalities be limited to (1) objections to the qualification of the presiding officer (after ascertaining whether or not he or she is a relative or employee of the deponent or opposing counsel, or has a financial interest in the case) and of the time, place and notice of taking the deposition; (2) objections to any errors or irregularities in the completion and return of the deposition by the presiding officer; (3) an agreement that the deponent may sign the transcript of his testimony before any notary; and (4) an agreement that attorneys for the respective parties may agree to corrections of the transcript at any time prior to submission to the court.

A typical form of stipulation reads as follows:

> "It is stipulated and agreed by and between the attorneys for the respective parties that all objections to the taking of the deposition(s) of ___________, on the grounds of the disqualification of the person before whom the deposition(s) is (are) taken, and of the time, place, and notice of taking are hereby waived."
>
> "It is also stipulated that the witness(es) may be sworn and may sign the transcript of his (their) testimony, after having examined the same in accordance with Rule 30(e) of the Federal Rules of Civil Procedure, before any notary public of the State of ___________."
>
> "It is also stipulated and agreed that attorneys for the respective parties may agree to corrections of the transcript at any time prior to submission to the court."
>
> [To be used where Government takes deposition of a witness for the defendant.] "It is also stipulated and agreed that the transcript of the testimony will be read, corrected, if necessary, and signed by the (each) witness no later than [date]."

Any defects that occur during the taking of a deposition may be cured by a stipulation at that time or at the end of the deposition session. It is recommended that the reading and signing of a deposition by the deponent or the prompt filing of the deposition not be waived.

b. Scope of the Examination

Rule 26(b) provides that the deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of either party. The deponent may also be questioned concerning the existence, description, etc. of any books or records and the location of persons having knowledge of discoverable matter. The objection of inadmissibility at trial will not lie if the testimony appears reasonably calculated to lead to the discovery of admissible evidence.

It is permissible for the witness to offer hearsay evidence. The witness should answer all relevant questions, leaving the determination of their admissibility as evidence for the trial.

c. Examination and Cross-Examination

Pursuant to Rule 30(c), examination and cross-examination may proceed as permitted at trial. Leading questions may be used in the direct examination of a hostile witness, an adverse party, or a witness identified with an adverse party. Fed. R. Evid. 611(c). The credibility of the deponent may be attacked by any party, including the party calling him. Fed. R. Evid. 607. While cross-examination of the deponent should be limited to the subject matter of the direct examination and to matters affecting the credibility of the witness, Fed. R. Evid. 611(b) allows the court, at its discretion, to permit inquiry into additional matters as if on direct examination.

Where the staff takes the deposition of an officer or employer of a defendant corporation, the attorney may conduct the interrogation of such witness by the use of leading questions and may seek to impeach or contradict the witness. If counsel for the defendant corporation wishes to examine the witness on additional matters, and if that is agreeable to the Government attorney, the interrogation by defendants' counsel should be conducted as if on direct examination, although defense counsel would be permitted to attempt to impeach the witness.

d. Objections to Evidence

Rule 32(d)(3)(A) provides that objections to the competency of a witness or to the competency, relevancy or materiality of testimony are not waived by failure to make them before or during the taking of a deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time.

Objections to irregularities of a more formal nature, such as the form of questions and answers, the oath, the conduct of the parties, and other similar matters which might be obviated, removed, or cured if promptly presented, are waived unless reasonable objection is made at the taking of the deposition. Rule 32(d)(3)(B).

Rule 30(d) permits any party or the deponent, upon a showing that the examination is being conducted in bad faith or in a manner to annoy, embarrass or oppress the deponent or party unreasonably, to move the court in which the action is pending or the court in the district in which the deposition is being taken for an order to cease taking the deposition or to limit the scope and manner as provided in Rule 26(c). Upon demand of the moving person, the taking of a deposition shall be suspended for the time necessary to make such a motion. The court may award reasonable expenses, including attorney's fees, to the prevailing party. Rule 37(a)(4).

e. Recording Objections

Rule 30(c) provides that the presiding officer shall note upon the deposition all objections made at the time of the examination to the qualifications of the officer taking the deposition; the manner of taking; the evidence presented; the conduct of any party; and any other objections. Evidence objected to shall be taken subject to the objections.

f. Documentary Evidence

Any documents to be used during the deposition should be submitted to the presiding officer prior to use to be numbered serially and marked for identification. The defendant may also use documents during cross-examination and such documents should be numbered differently. It is good practice to mark each exhibit with the witness' name as well as a number or letter, e.g., "Allen No. 1," and to attach copies of all exhibits to the transcript. For a full discussion of organizing exhibits and employing them in examination, see Chapter VI, Section II.

8. Formalities at the Conclusion of the Deposition

a. Correcting the Transcript

As a practical matter, the parties review the deposition transcript and discuss and agree on corrections that should be made in the record before it is signed. Under Rule 30(e), the deponent may make any changes in form or substance that the witness desires; changes must include a statement of the reasons given for making the changes. If the changes contradict or materially change the testimony, it may be advisable, under certain circumstances, to reopen the deposition to examine the witness, under oath, on the reasons for the new statements and changes.

Mechanical errors and irregularities, such as the way the reporter transcribed the testimony or prepared the transcript for filing, or otherwise dealt with the deposition as he is required to do under Rule 30(c) and 31(b), may be corrected by agreement of the parties. In the absence of agreement on such mechanical matters, Rule 32(d)(4) authorizes a party to move, with reasonable promptness after a defect is or might have been ascertained, for suppression of the deposition or any part of it. Such a motion may be used to secure court approval of the corrections sought.

b. Signing by the Witness

Rule 30(e) provides that when the testimony is fully transcribed, the deposition shall be submitted to the witness for examination, unless such examination is waived by the witness and the parties.

The deposition must be signed by the witness, unless the parties have waived the signing, or the witness is ill, cannot be found, or refuses to sign. If the witness does not sign within 30 days of submission of the deposition, the presiding officer shall sign it and state on the record the fact of waiver or other reason. See Rule 32(d)(4).

As a matter of convenience, it is desirable to have the parties stipulate at the taking of the deposition that, if the deponent does not wish to make any material changes in his testimony after it has been transcribed, the deponent may sign before any notary public to obviate the need to bring back the presiding officer. However, the deposition should then be returned to the presiding officer, or reporter, so that the officer may comply with Rule 30(f).

c. Certificate of Presiding Officer

Rule 30(f)(1) requires that the presiding officer shall certify on the deposition that the witness was duly sworn by him and that the deposition is a true record of the testimony given by the witness. Unless subsequent formalities are waived, the officer should then seal the deposition in an envelope indorsed with the title of the action and marked "Deposition of ____________" and promptly file it with the court in which the action is pending. Also, any protective orders affecting public filing should be marked on the envelope.

d. Filing in Court and Inspection

Rule 30(f)(1) provides that the presiding officer shall promptly file the deposition with the court where the action is pending. It is not recommended that prompt filing be waived; further, a deposition that has not been filed and thereby made part of the record of the case cannot be considered by appellate courts hearing interlocutory appeals. Fed. R. App. P. 10(a).

9. Expenses of Taking Depositions

Some of the costs of taking depositions may be recovered by the prevailing party pursuant to 28 U.S.C. § 1920, which enumerates costs that may be taxed against losing parties in the federal courts. See also 28 U.S.C. § 2412.

Among the taxable costs allowed by § 1920 are marshal's fees, the costs of deposition transcripts and witnesses' travel expenses. These items of cost may be awarded in the court's discretion.

Certain expenses may also be awarded to prevailing parties under Rule 37 as sanctions imposed upon parties who fail to appear at their own depositions and upon parties, deponents and their counsel who fail to answer, or give evasive or incomplete answers to, questions at depositions.

10. Use of Deposition at Trial

a. Application of the Federal Rules of Civil Procedure

Rule 32(a) provides that a deposition, or any part thereof, may be used at trial or in any preliminary hearing so far as admissible under the Federal Rules of Evidence, against any party that was present or represented at the taking of the deposition or that had reasonable notice of the deposition.

The following provisions of Rule 32(a) are applicable:

(1) A deposition may be used by any party to contradict or impeach the testimony of deponent as a witness.

(2) The deposition of a party (including its officers, directors, or managing agents, or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party) may be used by an adverse party for any purpose.

(3) The deposition of any person may be used by any party for any purpose if the court finds:

- -- that the witness is dead;
- -- that the witness is at a greater distance than 100 miles from the place of trial or is out of the United States, unless the absence was caused by the party offering the deposition;
- -- that the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment;
- -- that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or
- -- upon application and notice, a showing of exceptional circumstances is made.

b. Application of the Federal Rules of Evidence

In addition, the Federal Rules of Evidence allow more liberal use of depositions than Rule 32(a).

(1) Deposition statements of a non-party witness may also be offered at trial as substantive evidence if the deponent testifies at trial and is subject to cross-examination concerning the statements, and the statements are

(a) inconsistent with his trial testimony, Fed. R. Evid. 801(d)(1)(A); or

(b) consistent with his trial testimony and are offered to rebut a charge against him that his trial testimony is fabricated or improperly influenced or motivated. Fed. R. Evid. 801(d)(1)(B).

(2) The statement that is an admission by a party-opponent is admissible as substantive evidence under the circumstances described in Fed. R. Evid. 801(d)(2).

(3) If a witness is unavailable, as that term is defined by Fed. R. Evid. 804(a), the deposition will not be excluded as hearsay when offered against a party if that party had an opportunity and similar motive to develop the testimony of the witness at his deposition by direct, cross, or redirect examination. Fed. R. Evid. 804(b)(1).

c. Use of Part of the Deposition

If only part of a deposition is offered in evidence, an adverse party may require the contemporaneous introduction of any other part which ought in fairness to be considered with the part introduced, and any party may introduce any other parts. Rule 32(a)(4); Fed. R. Evid. 106.

d. Objections to Admissibility

Rule 32(b) provides that objections may be made at trial to the admissibility of any deposition for any reason which would require the exclusion of the evidence if the witness were then present and testifying. The only exceptions to this Rule relate to objections that must be made at the time of the deposition. *See* Rule 32(d)(3).

e. Effect of Taking or Using Depositions

The Federal Rules of Evidence have eliminated the concept that a party calling or taking the deposition of a witness vouches for that witness and is barred from impeaching the witness.

Fed. R. Evid. 607 provides that the credibility of a witness may be attacked at trial by any party, including the party calling the witness. Fed. R. Evid. 611(c) provides that when a party calls a hostile witness, an adverse party or a witness identified with an adverse party at trial, interrogation may be by leading questions. Taking the deposition of a witness does not bind the party to frame questions as on direct examination.

11. Videotaped Depositions

Where it may be important or tactically advantageous to provide to a judge or jury an audio and visual presentation of the testimony of a non-appearing witness, the use of a videotaped deposition might be considered. A number of courts have held that Rule 30(b)(4) authorizes the videotaping of oral depositions, even over the objections of deponents, and have further held such videotaped depositions to be admissible in both civil and criminal cases. See, e.g., In the Matter of James M. Daniels, Jr., 69 F.R.D. 579 (N.D. Ga. 1975); United States v. LaFatch, 382 F. Supp. 630 (N.D. Ohio 1974).

Rule 30(b)(4) requires that the recording of deposition testimony by other than stenographic means can only be done upon motion and order of the court, even where the parties may be willing to stipulate to such procedure under Rule 29. The court's order can be designed to eliminate possible abuse arising from videotaping that presents an unfair picture of a deponent. See In the Matter of Daniels, supra. For a discussion of the types of videotape equipment available, the techniques of videotaping a deposition and presenting it in a courtroom, the methods of conforming a videotape recording to the signing and filing requirements of Rule 30, and a form of Rule 29 stipulation for such purposes, see Miller, Videotaping the Oral Deposition, 18 Practical Lawyer 45 (1972).

C. Use of Interrogatories

1. Applicable Federal Rule of Civil Procedure

Under Fed. R. Civ. P. 33, written interrogatories may be served upon the plaintiff at any time after the action is filed and upon any other party with or after service of the summons and complaint upon that party.

2. Form and Use of Interrogatories

Each interrogatory must be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for objection shall be stated. Unless the court rules otherwise, answers and objections must be served within 30 days after the service of the interrogatories. A defendant may serve answers or objections within 45 days after service of the summons and complaint.

An interrogatory is proper so long as it is directed at obtaining information reasonably calculated to lead to the discovery of admissible evidence. See Rules 33(b) and 26(b)(1).

Under certain circumstances, a party may answer an interrogatory by specifying the records from which the answer may be ascertained and affording the serving party an opportunity to examine and copy such records. See Rule 33(c) Where defendants respond to interrogatories by directing Division attorneys to a mass of business records or even to all of the defendant's records, the response may be objected to since Rule 33(c) specifies that the option of producing records is permitted only where "the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served . . . ." Further, Rule 33(c) requires that the answering party "specify" the records from which an interrogatory may be answered. 1/

Interrogatories requiring statements of opinion or contentions may be helpful as a means of narrowing the issues and of determining whether defendants will raise affirmative defenses. Such interrogatories are important in establishing what the affirmative defense is and how it is framed. In circumstances not involving affirmative defenses, it is usually the better practice for Division attorneys to avoid asking numerous and detailed "contention" interrogatories.

Interrogatories are an important tool in obtaining such information as the identification of corporate officers, the company's business in the relevant products or geographical markets, names of personnel having information that is relevant to the subject matter of the action, the description and location of documents that may later be subject to a Rule 34 request, and dates and places of meetings and other information of material value.

1/ An amendment to Rule 33(c) requiring the respondent to specify and organize the documents in detailed fashion has been proposed by the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States. Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure (February 1979) 80 F.R.D. 323. See Report of the National Commission for the Review of Antitrust Laws and Procedures at 49.

3. Objections to Interrogatories

If objections are made to interrogatories, or if an answer is evasive or incomplete, the burden is on the interrogating party to move for sanctions or to compel discovery under Rule 37.

The courts tend to be quite liberal in requiring answers to interrogatories, and objections to those served upon the Division usually should be based on factors that create an undue burden or that would not lead to the discovery of evidence admissible at trial. The staff should be careful, however, not to waive any of the Division's rights with respect to information of a privileged nature.

D. Requests to Produce Documents

1. Applicable Federal Rule of Civil Procedure

Under Rule 34, a party may, without leave of court, serve upon any other party a request to produce and permit the inspection and copying of designated documents, not privileged, that are relevant to the subject matter of the action and which are admissible as evidence or appear reasonably calculated to lead to the discovery of admissible evidence.

2. Use of Requests to Produce Documents

A Rule 34 request may be served upon the plaintiff at any time after commencement of the action and upon any other party with or after service of the summons and complaint upon that party. Rule 34 requires that the request specify the items to be inspected either by individual item or by category and describe each item and category with reasonable particularity. The request must also specify a reasonable time, place, and manner of carrying out the inspection and copying.

The party upon whom the request is made is required to serve a written response within the time periods set in Rule 34. Unless objection is made, the response must state, with respect to each item and category, that inspection and copying will be permitted as requested. If objection is made to the request, the reasons for the objection must be stated; if objection is made to only part of an item or category, the part shall be specified. In the event that an objection is made, or if there is a failure to produce, Rule 34 places on the party submitting the request the burden of moving the court for an order under Rule 37, compelling production for inspection and copying.

3. Drafting the Request

Many of the same considerations that apply to drafting grand jury subpoenas *duces tecum* and documentary CIDs are equally relevant to Rule 34 requests. *See* Chapter VI, Section II, *infra*. Requests should be made as specific as possible. Careful consideration should be given to limiting the time frame of the documents requested. Under most circumstances, it is likely that some documents will have been obtained during the investigation stage by means of CIDs or premerger notification procedures. This may limit the need for extensive document discovery from defendants.

4. Compliance Procedures

a. Limiting the Scope

Attorneys for the parties frequently attempt to narrow the scope of document requests through negotiation. Good faith agreements of this nature are much preferred to time-consuming litigation over such matters. Information about the corporate filing system may permit agreements limiting file searches to specific locations or files. It may also be possible to exclude certain kinds of documents, such as invoices or other transaction documents. The terms of any negotiated agreement related to a Rule 34 request always should be reduced to writing. The Division should preserve its right to require production of all documents originally requested at a later time.

b. On-Site Screening

A preliminary screening at defendants' offices is one method of dealing with large masses of documents that are responsive to a document request. It is possible to eliminate a great many irrelevant or unimportant documents in this way. Also, defendants' employees and attorneys are available to answer questions and facilitate the review.

Conversely, there is a tendency during such on-site screenings to move *too* fast, thereby missing some important documents. The better procedure is to use such screenings to eliminate voluminous, clearly unwanted categories of documents, and to reserve the more deliberate review for later.

c. Requiring Originals or Copies

The Division should require the production of originals for inspection and copying. While originals are preferable to copies, the differences in quality are often not significant, assuming defendant has made a good faith effort to provide good copies. Division attorneys may well decide to accept delivery of copies in their offices, reserving the right to inspect originals. This may be advantageous if defendants also agree to number and segregate the documents.

d. Numbering and Sorting

Control of the documents is facilitated by numbering them. In most cases it is obviously preferable for defendants to number the documents, and defendants usually desire to do so for their own organizational purposes.

If defendants do number their documents, negotiations should be undertaken to establish a logical and workable numbering system. Such numbering facilitates identification and authentication of documents at depositions and trial.

e. Privileged Documents; Confidentiality

The Rule 34 request should require identification of all documents withheld on any basis of privilege, using a form similar to those employed with grand jury subpoenas or documentary CIDs.

Defendants may also desire to limit the Division's use of documents containing competitively sensitive or highly confidential information. Under appropriate circumstances, the Division will enter into such agreements, and, pursuant to Rule 26(c), move for a protective order. Protective orders should not be broader than necessary to protect the parties' legitimate interests and should not significantly interfere with the conduct of discovery or trial.

In appropriate circumstances the Division staff may agree to provide defendants with notice of the intention to disclose such documents to third parties. Such agreements should be reduced to writing and should specifically exclude economists, computer personnel or other individuals working for the Division on a contractual basis. The agreement should be drafted to avoid committing the Division to procedures that would significantly affect the use of such information at trial.

This issue is often raised during pre-trial conferences. The Division customarily opposes sealing or otherwise limiting access to the trial record by the public.

E. Requests For Admissions

Under Rule 36, a party may, without leave of court, serve upon any other party a request for the admission of the truth of any matter, not privileged, that is relevant to the subject matter of the pending action and that relates to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request and served with it.

Rule 36 is designed to reduce trial time by eliminating issues from the case and by facilitating proof with respect to issues that cannot be eliminated.

A request for admissions must set out separately each matter as to which an admission is requested, and the matters are deemed admitted unless the party to whom the request is directed serves upon the requesting party a written answer or objection within the time periods set by the Rule.

Under Rule 36 the effect of admitting a matter is to establish the truth or genuineness of that matter for the purpose of the pending action. It is not an admission for any other purpose and may not be used against the admitting party in any other proceeding. Rule 36 also authorizes the court to permit the withdrawal or amendment of an admission under appropriate circumstances. The Rule does not require that answers to requests for admissions be sworn; it merely requires the answers to be signed by the party or by his attorney.

Rule 36 requests for admissions are typically employed less often than the more traditional discovery devices of depositions, interrogatories and document requests. Such requests can, however, aid significantly in identifying and narrowing issues in a complex case. Rule 36 requests can be most efficiently employed as a part of comprehensive pre-trial plan for resolution of issues, and such a program should be subject to close supervision by the court.

The requests for admission may be used in conjunction with other pre-trial devices, such as statements of contentions and stipulations of fact.

IV. Procedures and Suggestions for Conducting the Litigation of a Civil Case

A. Recommended Procedures for Simplifying and Expediting Civil Litigation

Division attorneys should endeavor to expedite and streamline civil litigation to the greatest extent practicable. In doing so, attorneys should be cognizant of certain practices recommended in the Manual for Complex Litigation (Manual), and the recommendations of the National Commission for the Review of Antitrust Laws and Procedures. While these suggestions may not be applicable in every case, they are procedures that experience has demonstrated to be helpful aids in many cases.

(1) A single federal district judge should be assigned to the case for all purposes. The knowledge and expertise gained by the judge overseeing an antitrust case should provide the incentive and opportunity for the judge to exercise closer, active supervision over all phases of the litigation.

There are, however, circumstances where the judge may wish to use a magistrate or special master to supervise certain pre-trial matters.

The Division may determine, on a case-by-case basis, the type of argument that will be made either proposing or opposing the use of a magistrate or special master. See 28 C.F.R. § 50.11 (1977).

The Legal Procedure Unit maintains a central file of information concerning individuals who have been selected or considered for selection as special masters in Division cases. 2/

2/ This information is contained on two forms that are filled out at the conclusion of any case where a master is used: ATR 166 (Selection of Special Masters) and ATR-167 (Special Masters Evaluation). These forms furnish information regarding the particular case, the process by which the special master was selected, by whom he was paid, the problems, if any, that arose in the master's selection or use, and whether the special master helped in accelerating the resolution of the case. The forms also furnish information on the qualifications of the master and an evaluation of each individual considered for selection.

(2) Pre-trial conferences should be used frequently for matters such as (a) establishing a timetable for pleadings and non-discovery motions; (b) scheduling discovery procedures; (c) setting limits on the scope of discovery; (d) narrowing issues; (e) directing early inquiry into pre-trial preparation such as expert testimony; (f) surveying evidence; (g) ruling on evidentiary objections; and (h) fixing the schedule for and nature of pre-trial briefs. Pre-trial conferences should provide the opportunity for the judge to exercise active and close supervision of pre-trial activities.

(3) Time limits and cutoff dates should be established. Time limits should be regularly used to expedite all major phases of litigation, including pleadings, non-discovery motions, and discovery. See Manual § 2.40. Schedules should be imposed for filing final pre-trial briefs, lists of witnesses and exhibits and other evidence to be offered at trial. See Manual § 3.30.

(4) At an early stage, the parties should exchange statements of fact and contentions of law. Such statements would be non-binding and would be followed by further exchanges throughout the pre-trial period. This concept may help to narrow and eliminate issues and focus more sharply the scope and direction of discovery. See Commission Report at 59. The Statements of Contention and Proof filed in United States v. American Telephone and Telegraph Company, et al., Civ. 74-1698 (D.D.C.), and the court imposed scheduling of pre-trial proceeding provide useful examples of this concept. 3/

(5) Close supervision and control by the court of procedures should be encouraged as a means to curb undue delay and abuse of discovery. Division attorneys should give more serious consideration to moving for relief under Rule 37 when faced with unreasonable discovery demands, since the Court must be made aware of wasteful and dilatory pre-trial techniques to employ management controls to remedy the situation. See Commission Report at 46.

3/ See Pre-trial Order No. 12 and Opinion, 461 F. Supp. 1314 (D.D.C. 1978) and Opinion on Discovery and Issue Narrowing, June 22, 1979 (D.D.C.).

(6) There should be flexibility in conducting discovery and developing issues and contentions of the case. Although the Manual suggests that discovery be conducted in consecutive waves, with each wave being limited to a different phase of inquiry, this procedure may cause undue delay. There should be flexibility in scheduling discovery suited to the particular objectives of the inquiry. See Commission Report at 48. Rule 26(d) directs that discovery may be carried on simultaneously by all litigants to prevent delay of another party's discovery.

(7) Limitations on the number of written interrogatories should be suggested. The number of written interrogatories that are required in even a complex case may be limited and a court should limit the number of interrogatories to a prescribed number. See Manual § 1.501.

(8) Stipulations of objective facts should be sought to the maximum extent possible in litigation. This may limit substantially the number of witnesses and exhibits introduced at trial. See Manual § 3.60 and Commission Report at 63.

(9) Judicial notice should be employed, where appropriate. The expanded use of judicial notice can help overcome the hesitancy of counsel to stipulate the facts that are not substantially disputed. Fed. R. Evid. 201(b), (c), and (f). See Commission Report at 66.

(10) Exchanges of relevant market information and market share data should be sought early. This helps to reduce the scope of discovery, and the information obtained may be useful in early motions for partial summary judgment or interim injunctive relief. See Commission Report at 65.

(11) Partial or full summary judgment under Rule 56 may be appropriate in some cases as an aid to expediting litigation by narrowing, resolving or eliminating issues, reducing the scope of discovery, shortening the length of trial and increasing settlement prospects. See Commission Report at 68.

(12) Separate trials of separate issues may be recommended in certain complex cases. Separate trials, however, may be effectively used only where there is little or no overlap between separated issues; otherwise, efficient litigation may be impeded because the issues may be framed too narrowly or evidence may be improperly excluded, and witnesses may be burdened by having to testify at several trials. See Commission Report at 105.

(13) Trial proof should be simplified and streamlined in advance of trial. See Commission Report at 100.

Several of the procedures recommended for pre-trial purposes can be useful in expediting the trial as well, e.g., time limits can be set for presentation of certain evidence and cross-examination. The use of stipulations, the exchange of market share data, and use of judicial notice can create concise compilations of evidence that may be read into the record and thus eliminate the need for more time-consuming procedures. See Commission Report at 100.

Further, the court may require the parties to exchange specific listings of their proposed exhibits and witnesses prior to trial and to state their objections to their opponents' exhibits and "offers of proof." The particular techniques for pre-trial preparation of trial proofs suggested by the Manual and endorsed by the Commission are described in detail in the Manual at §§ 2.70-71 and §§ 3.30-4.70. Among other things, these sections discuss the preparation of evidence based on expert opinion, computer-processed data, samples, polls and surveys. These are matters that are frequently encountered in antitrust cases, and the Manual and Commission Report suggestions can be useful.

(14) Relief issues should be considered from the earliest stages of the discovery process. The manner of discovery and pre-trial activity should concentrate heavily on the relief to be sought if the Division prevails on the merits. As stated in Chapter VI, Section II, the Division's major reason for challenging behavior or structure by a civil suit is to obtain adequate relief. Information that will assist the Division in establishing evidence to request such relief should be organized and determined early in the process.

The suggestions set forth in this section represent a general philosophy for expediting antitrust litigation. While these procedures are not determinative, experience has demonstrated their value and merit in many cases. Familiarity with the findings and analysis of the National Commission for the Review of Antitrust Law and Procedures, as well as the readings and comments that have flowed from the Commission's work, are useful to Division attorneys in developing a framework and a philosophy by which cases may be expedited.

In sum, judicial management and the cooperation of the parties results in a speedy and fair determination of the issues in controversy and effective resolution of the suit.

B. Summary Judgment

In many civil cases, either the Division or the defendants may make a motion for summary judgment. Rule 56 provides for the timing and requirements of the motion. The local rules of the district should also be consulted in preparing for summary judgment.

Summary judgment may be employed as a device to expedite a decision on the issues in the case. Either partial or full summary judgment motions are proper in certain circumstances.

Before making a motion for summary judgment, division trial staffs should consult with the section or field office Chief. If the Chief approves the request, it should be sent to the Office of Operations and the appropriate Deputy Assistant Attorney General for approval before filing.

In most cases, a memorandum setting forth the reasons for requesting summary judgment and a copy of the motion papers and accompanying affidavits and exhibits should be approved by the section or field office Chief and submitted to Operations before informing any party of the Division's intention to move for summary judgment.

Examples of summary judgment motions and briefs, both in support of government motions and in opposition to defendants' motions are found in the Exemplar File at Numbers 21, 25, 52, 71 and 130.

C. Civil Antitrust Trial Methods and Procedures

This Chapter has concentrated on the pre-trial procedures that are central to any civil antitrust case. The discussions of the methods of preliminary relief and discovery establish the framework by which trial preparation is conducted. Trial preparation is accomplished by fully employing the suggestions for pre-trial discovery in Section III, _supra_, and by applying the suggestions concerning the efficient development of a case in Section IV(A), _supra_.

This Section will not attempt to give tactical guidance to Division attorneys on trial methods. There are numerous handbooks and guides that discuss the application of trial methods and skills. One of the best practical sources of trial skills with which attorneys are familiar is the _Handbook_ of the Attorney General's Advocacy Institute. The _Handbook_ sets out a detailed set of methods employed in civil trials, including suggestions for opening statements, closing arguments, cross examination, and examination of expert witnesses. In addition, the Handbook offers a series of checklists and suggested models for admission of demonstrative evidence and documentary evidence, including suggestions for laying the foundation for admission of business records and summaries, the impeachment of witnesses, objections, trial motions, and rebuttal evidence.

The Handbook contains a major analysis of how to prepare trial witnesses and how to prepare and negotiate stipulations. The preparation of direct examination of government witnesses and ability to anticipate cross examination of defense witnesses is also discussed in the Handbook.

In addition to the Handbook, trial staffs should consult the suggestions set forth in Chapter VI, Section II, *infra*, to develop specific procedural skills, including the best means of preparing government experts for direct and cross examination. That section also sets forth the resources of the Division that are available to trial staffs in developing and presenting their cases.

The staff should always consult with the U.S. Attorney's Office in the district where the trial is held and with the Clerk of the Court to determine what local procedures are used by the court. Familiarity with custom and practice will assist the trial staff in presenting its case. The staff should also attempt to obtain a clear statement of the procedural aspects of the trial, as outlined at the final pre-trial conference or in a pre-trial order. Especially significant are local rules and practices of the district or circuit regarding the manner in which co-conspirator declarations are admitted into evidence and the manner in which the court admits testimony of expert witnesses. 4/ At all times, staff should protect the record by timely objections or motions to protect the Division's position in the event of an appeal.

4/ The Federal Rules of Evidence that relate to expert witnesses and the exhibits that they employ (Fed. R. Evid. 701-706, 1006) and the hearsay rules (Fed. R. Evid. 801-804) are usually most significant in antitrust litigation.

During the trial, the staff should begin preparing its findings of fact and conclusions of law, if applicable. This process is best developed through a careful digesting of the trial transcript and exhibits. Timely filing of these documents at the conclusion of the trial will expedite the final arguments and the court's decision. They are also extremely valuable for use in the appellate process.

The trial itself is based on the preparation and analysis that have preceded it. It is important to be as completely prepared for the proceedings as possible, remembering that the Division is not only an advocate for a position but the representative of the Attorney General and the Government in the courtroom.

V. Negotiating and Entering Consent Decrees

In general, adequate relief in a civil antitrust case is relief that will (1) stop the illegal practices alleged in the complaint, (2) prevent their renewal and (3) restore and monitor competitive conditions. Normally, the Government is entitled to any relief that is reasonable and necessary to accomplish these ends. While the scope of relief employed in prior antitrust cases may be viewed as precedent, the theory behind equitable relief is that it should be fashioned to fit the particular facts of the case at issue.

Often, it is possible to obtain effective relief without taking the case to trial. This section describes the procedures employed by the Antitrust Division in negotiating and entering consent decrees under the Antitrust Procedures and Penalties Act of 1974, 15 U.S.C. § 16.

A. Antitrust Procedures and Penalties Act

The Antitrust Procedures and Penalties Act (APPA), 15 U.S.C. § 16, was enacted on December 21, 1974. The provisions of the APPA concerning consent judgment procedures impose a number of obligations upon the Division to insure that the Division's consent judgments are subject to public scrutiny and meaningful comment. The Division must insure complete compliance with the requirements of the APPA. The following information and procedures are required by the Act.

1. The Competitive Impact Statement

The most significant requirement of the APPA is the filing with the Court of a Competitive Impact Statement (CIS) at the time the proposed consent judgment is filed. This document must be self-contained, setting forth the information necessary to enable the Court and the public to evaluate the proposed judgment in light of the Government's case. Its object is to explain why the proposed judgment is appropriate under the circumstances and why it is in the public interest. Since the CIS is directed to the public, as well as to the Court, it should be written in a narrative style that avoids technical jargon. As a general rule, the CIS will not use extensive verbatim quotations from the Complaint and Judgment.

Since the CIS is the Division's explanation of its case, the judgment, and the circumstances surrounding the judgment, it should not be the subject of discussion or negotiation with defense counsel. Defense counsel will not be permitted to review the CIS prior to its filing with the court. Exceptions to this procedure must be approved by the Assistant Attorney General.

The CIS must contain a description of the nature and purpose of the proceeding and the practices or events giving rise to the alleged violation. This discussion must go beyond the allegations in the complaint. The CIS should describe the defendants and the trade and commerce involved; it should also describe the challenged activity in sufficient detail to convey the essence of the alleged violation. For instance, in a merger case, the industry, the parties' relationship to the industry and to each other, and the theory of the violation should be explained.

The CIS should describe the proposed relief in a manner that the public will understand. All material provisions of the proposed judgment should be discussed. The reasoning behind the Division's acceptance of the proposed relief and the anticipated competitive effect of the relief must be set forth. Although this discussion should be persuasive, it also should be candid.

The CIS must also describe and evaluate alternative forms of relief actually considered. This does not mean negotiated language changes must be discussed unless such changes significantly alter the judgment's scope. Similarly, defendant's proposals which were unacceptable need not be discussed, unless they would have provided broader relief than that ultimately accepted. In general, alternative forms of relief actually considered would include only those (a) in the prayer, (b) submitted to defense counsel in writing during negotiations or (c) submitted to the Assistant Attorney General in writing by the staff. The discussion of alternatives and the Division's reasons for not adopting them should be candid.

The CIS must also discuss the remedies available to potential private plaintiffs. This discussion will be brief and probably standard in most instances.

2. Materials and Documents

The APPA requires the Division to file with any proposed consent judgment all materials and documents considered determinative in formulating the judgment. In most cases the relief is determined by the sum total of the Division's investigation and evidence. There will seldom be any particular document or documents that influenced the formulation or rejection of a particular item of relief. The materials and documents, if any, to be filed would consist of submissions by the defendants or other persons, including other government agencies or experts' studies, that were determinative in formulating the judgment. There may be some difficulties involved in interpreting this requirement in particular cases. Where this occurs, the Office of Operations should be consulted.

3. Publication in the Federal Register

The APPA requires that the proposed judgment and the competitive impact statement be published in the Federal Register "at least 60 days prior to the effective date of such judgment." Public comments and the Division's reply to them must be published within the 60 day period.

Several issues are posed by these requirements. First, there is at least a five-working day delay between submission of materials and publication in the Federal Register. Since the Division does not request publication until the filings are made with the Court, there will be at least an additional five days added to the 60 day waiting period. Second, the APPA has two requirements concerning the publication of comments and responses. Section 2(b) requires publication of both. Section 2(d) provides that at the close of the period the Division shall file with the District Court, and publish in the Federal Register, a response to such comments.

The Division publishes both the comments and responses. In general, it is preferable to answer comments, by a single response, if possible, ten days prior to the expiration of the waiting period. All comments and responses will be filed with the Court and published in the Federal Register as soon thereafter as possible. If additional comments are received just prior to the expiration of the waiting period, the Division should respond, file, and publish the additional comments and responses after the period has expired.

4. Newspaper Publication

The newspaper notices required by the APPA must begin appearing 60 days prior to the effective date of the judgment and must appear in the legal notice section. They should be as brief as possible and, if at all possible, be limited to 30 typewritten lines. Since newspapers occasionally fail to publish a notice or do so inaccurately, the staff attorneys should check the newspapers in which publication is made to assure the correctness of the notice. If the newspaper notice is incorrect, Operations should be notified immediately to correct the notice.

Occasionally, the Court will require additional newspaper publication beyond the minimum requirements of the APPA. Often the Court is unaware of the cost of the additional publication, and the trial staff, where the cost of the additional publication appears to be excessive, should request a delay until it can ascertain the costs and, if possible, establish an alternative publication schedule which will reduce the cost but meet the Court's objective.

The Office of Operations is responsible for arranging newspaper and Federal Register publication and obtaining the necessary affidavits of publication.

B. Internal Procedures

It is the general practice of the Division that settlement negotiations by consent judgment be initiated by the defendants. Defense counsel should submit a proposed first draft of a judgment that is a good faith offer of settlement. This procedure is utilized unless the Chief of the section or field office to which the case is assigned believes it advisable for the Government to submit a first draft.

Judgment negotiations are conducted by the trial staff under the immediate supervision of the Chief of the section or field office. The Chief and trial staff must submit any written settlement proposal to be submitted to defense counsel to the Office of Operations. Information copies of memoranda of conferences and drafts of judgments submitted by defendants should be forwarded to the Office of Operations.

The staff should make clear to defense counsel that final authority to approve the judgment rests with the Assistant Attorney General, and that the judgment is subject to change at any time prior to its formal entry by the Court. Defense counsel should also be advised of the requirements of the APPA, including Section 2(g), which requires each defendant to file a description of all oral and written communications with the Government concerning the decree. Defense counsel should also be informed that they will not be permitted to review the materials, other than the proposed judgment, prior to filing with the Court. In general, the views of the Division reviewers should not be communicated to defense counsel by the trial staff.

In preparing its proposed draft decree, staff should consult Sections D and E, infra, for form and language employed by the Division in its decrees. Once the staff has had its proposed draft decree approved by the Office of Operations, it should conduct negotiations consistent with the overall plan of relief contained in the approved draft. Staff may consult informally with the Office of Operations to determine current Division practice and alternative relief proposals.

In recommending rejection or modification of defense proposals, or in seeking a resolution of relief problems, the Chief of the section or office should submit a recommendation to the Office of Operations. The recommendation will briefly summarize the negotiations, describe the areas of disagreement, and indicate the scope of the relief offered.

When a proposed final consent judgment is submitted for approval, the section or field office Chief will submit a recommendation to the Office of Operations. The recommendation should include all necessary papers, including the stipulation, the decree, the competitive impact statement, the Federal Register and newspaper notices, and the proposed press release. Also, the Federal Register requires a brief introductory notice identifying the nature of the documents being published. The notice should be prepared for the signature of the Director of Operations. All papers should be forwarded for review with the recommended consent judgment.

At the time of filing the judgment with the Court, the requirements of the APPA and the procedures for complying with the Act should be explained to the Court. It should be emphasized that the waiting period may exceed 60 days because of the publication requirements and the possibility of receiving last minute comments. The Court must be informed that it should not sign and enter the decree until the requirements have been met and that the staff will advise the Court by letter when the requirements are met. Operations should be informed before the letter is sent.

The Office of Operations will arrange for the necessary Federal Register publication and place the newspaper notice in a newspaper of general circulation in the District of Columbia and in a newspaper of general circulation in the district where the case was filed and such other districts as the Court may direct.

C. Consent Decree Checklist

The following is a useful checklist to keep track of the various requirements of the APPA. Staff should employ such a list for each consent decree.

United States v. ____________________

Civil Action No. ____________________

Date

1. Negotiations commenced ____________
2. CIS and judgment filed with Court ____________
3. CIS and judgment lodged with Federal Register ____________
4. Published in Federal Register ____________
5. Newspaper publications and dates
    (a) Washington Post or Washington Star ____________
    (b) District newspaper ____________
    (c) Other newspaper(s) ____________
6. Final date for comments ____________
7. Comments (Yes or No)
8. Responses (Yes or No)
9. Published comments & responses in Federal Register ____________
10. Filed comments & responses with Court ____________
11. Defendant statement filed with Court ____________
12. Compliance with APPA effected ____________
13. Letter to Court ____________
14. Date judgment entered ____________

D. Consent Decree Standard Provisions

The Antitrust Division has established a standard form for a number of the provisions of each consent decree. These provisions are designed to ensure consistency and fairness in both negotiating practice and Division policy. The following provisions are those where standard language is employed by the Division in consent decrees. For reference and convenience, each is set forth as a separate section.

1. Stipulation

UNITED STATES DISTRICT COURT

DISTRICT OF

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	Civil Action No.
v.	)	
	)	Filed:
	)	Entered:
Defendants.	)	

STIPULATION

It is stipulated by and between the undersigned parties, by their respective attorneys, that:

1. The parties consent that a Final Judgment in the form hereto attached may be filed and entered by the Court,

upon the motion of any party or upon the Court's own motion, at any time after compliance with the requirements of the Antitrust Procedures and Penalties Act (15 U.S.C. § 16), and without further notice to any party or other proceedings, provided that plaintiff has not withdrawn its consent, which it may do at any time before the entry of the proposed Final Judgment by serving notice thereof on defendants and by filing that notice with the Court.

2. In the event plaintiff withdraws its consent or if the proposed Final Judgment is not entered pursuant to this Stipulation, this Stipulation shall be of no effect whatever and the making of this Stipulation shall be without prejudice to any party in this or any other proceeding.

Dated:

FOR THE PLAINTIFF:

JOHN H. SHENEFIELD Assistant Attorney General	[Staff Attorney]
[Director or Deputy Director of Operations -- the person who reviewed the case and signed the Complaint]	[Staff Attorney]
[Special Assistant for Judgment Negotiations]	[Staff Attorney]
[Chief of the Office]	

FOR THE DEFENDANTS:

[Type in name of each counsel and defendant represented]

2. Preamble to Decree

FINAL JUDGMENT

Plaintiff, United States of America, having filed its complaint herein on , and plaintiff and defendants, by their respective attorneys, have consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law herein and without this Final Judgment constituting any evidence against or an admission by any party with respect to any such issue;

NOW, THEREFORE, before the taking of any testimony and without trial or adjudication of any issue of fact or law herein and upon consent of the parties hereto, it is hereby,

ORDERED, ADJUDGED, AND DECREED as follows:

3. Jurisdictional Clause

This Court has jurisdiction of the subject matter of this action and of each of the parties consenting hereto. The Complaint states a claim upon which relief may be granted against each defendant under Section 1 of the Sherman Act (15 U.S.C. § 1) [or other applicable law].

4. Applicability Clause

This Final Judgment applies to the defendants and to their officers, directors, agents, employees, subsidiaries, successors and assigns, and to all other persons in active concert or participation with any of them who shall have received actual notice of this Final Judgment by personal service or otherwise.

5. Sale of Assets Provision

Each Defendant shall require, as a condition of the sale or other disposition of all, or substantially all, of the assets used by it in the manufacture and sale of [product], that the acquiring party agree to be bound by the provisions of this Final Judgment, and that such agreement be filed with the Court.

6. Visitorial Clause

For the purpose of determining or securing compliance with this Final Judgment, and subject to any legally recognized privilege, from time to time:

(A) Duly authorized representatives of the Department of Justice shall, upon written request of the Attorney General or of the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to a defendant made to its principal office, be permitted:

> (1) Access during office hours of such defendant to inspect and copy all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of such defendant, who may have counsel present, relating to any matters contained in this Final Judgment; and
>
> (2) Subject to the reasonable convenience of such defendant and without restraint or interference from it, to interview officers, employees and agents of such defendant, who may have counsel present, regarding any such matters.

(B) Upon the written request of the Attorney General or of the Assistant Attorney General in charge of the Antitrust Division made to a defendant's principal office, such defendant shall submit such written reports, under oath if requested, with respect to any of the matters contained in this Final Judgment as may be requested.

No information or documents obtained by the means provided in this Section ________ shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Executive Branch of the United States, except in the course of legal proceedings to which the United States is a party, or for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

(C) If at the time information or documents are furnished by a defendant to plaintiff, such defendant represents and identifies in writing the material in any such information or documents to which a claim of protection may be asserted under Rule 26(c)(7) of the Federal Rules of Civil Procedure, and said defendant marks each pertinent page of such material, "Subject to claim of protection under Rule 26(c)(7) of the Federal Rules of Civil Procedure," then 10 days notice shall be given by plaintiff to such defendant prior to divulging such material in any legal proceeding (other than a grand jury proceeding) to which that defendant is not a party.

7. Expiration of Judgment

This final judgment will expire on the tenth anniversary of its date of entry or, with respect to any particular provision, on any earlier date specified.

8. Retention of Jurisdiction

Jurisdiction is retained by this Court for the purpose of enabling any of the parties to this Final Judgment to apply to this Court at any time for such further orders or directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment, for the modification of any of the provisions hereof, for the enforcement of compliance herewith, and for the punishment of any violation hereof.

9. Statement of Public Interest

Entry of this Final Judgment is in the public interest.

Dated:

UNITED STATES DISTRICT JUDGE

E. Compliance Provisions

Although the compliance provisions of each decree may vary depending on the present compliance program that the company maintains and the necessity for specific compliance features as they affect an industry, the following are model compliance provisions that have been employed by the Division:

1. Compliance Provision in U.S. v. Alton Box Board Co.

(A) Each Defendant shall advise each of its officers who has management responsibility for the manufacture or sale of folding cartons, and each of its employees and managing agents who is engaged in the sale of or who has responsibility for or authority over the establishment of prices for folding cartons, of its and their obligations under this Final Judgment. For a period of ten (10) years from the entry of this Final Judgment, each Defendant shall maintain a program to insure compliance with this Final Judgment, which program shall include at a minimum the following with respect to each of the persons described immediately above:

(1) The annual distribution to them of this Final Judgment or a summary thereof;

(2) The annual submission to them of a written directive setting forth the Defendant's policy regarding compliance with the Sherman Act and with this Final Judgment, with such directive to include: (a) an admonition that non-compliance with such policy and this Final Judgment will result in appropriate disciplinary action determined by the Defendant and which may include dismissal, and (b) advice that the Defendant's legal advisors are available at all reasonable times to confer with such persons regarding any compliance questions or problems;

(3) The imposition of a requirement that each of them sign and submit to his employer, once a year, a certificate in substantially the following form:

> "The undersigned hereby (1) acknowledges receipt of a copy of the 1979 Folding Carton Final Judgment and a written directive setting forth the Company policy regarding compliance with the antitrust laws and with such Final Judgment, (2) represents that the undersigned has read and understands such Final Judgment and directive, (3) acknowledges

> that the undersigned has been advised and understands that non-compliance with such policy and Final Judgment will result in appropriate disciplinary measures determined by the Company and which may include dismissal, and (4) acknowledges that the undersigned has been advised and understands that non-compliance with the Final Judgment may also result in conviction for contempt of court and imprisonment and/or fine;"

(4) The holding of one or more meetings with them to review the terms of this Final Judgment and the obligations it imposes, with such meetings to be arranged and conducted so that each of them attends at least one such meeting within a twelve (12) month period; and

(5) The imposition of a requirement that for a period of five (5) years from the entry of this Final Judgment each of them is, subject to a legally recognized privilege, to report to Company counsel in writing each communication of the type described in Paragraph IV(B), and not otherwise permissible under Section V of this Final Judgment, with an officer, director, representative or employee of any other Defendant or of any other company which manufactures folding cartons. Each of them is to meet this requirement by completing a written report of each such communication, within thirty (30) days of the communication, the names of all individuals who participated in the communication, and the topics discussed during the communication. Any person required to complete reports of communications by this Paragraph and who completes no such reports during any twelve (12) month period must certify that he or she had no communications of the type described in Paragraph IV(B) of this Final Judgment. Each Defendant shall include in its annual sworn statement required to be filed by Paragraph VII(B) of this Final Judgment, the name and address of each person, if any, who has failed to submit a report or certification required by this Paragraph during the twelve (12) month period preceding the filing of the Defendant's sworn statement and the reason given or privilege claimed by each such person for not filing a report or certification. The Defendants shall maintain for inspection by the Plaintiff all reports and certifications required by this Paragraph until the sixth (6th) anniversary date of entry of this Final Judgment.

(B) For a period of ten (10) years from the entry of this Final Judgment, each Defendant shall file with the Plaintiff, and under seal with the Court, on or before the anniversary date of this Final Judgment, a sworn statement, by a responsible official designated by the Defendant to perform such duties, setting forth all steps it has taken during the preceding year to discharge its obligations under this Section VII. This statement shall be accompanied by copies of all written directives issued by the Defendant during the prior year with respect to compliance with the antitrust laws and with this Final Judgment.

(C) Upon Order of the Court, on motion by the Plaintiff for good cause shown, the designated official shall appear before the Court to give sworn testimony on the manner of compliance with this Final Judgment.

(D) The plaintiff may demand a more detailed statement of a Defendant's compliance with this Final Judgment if Plaintiff determines that such Defendant's annual compliance statement incompletely states the steps it has taken to discharge its duties under this Section VII.

2. Compliance Provision in U.S. v. Borden, Inc.

(A) Once each year, for a period of five (5) years, each defendant shall conduct an audit of its operations to determine compliance with the provisions of this Final Judgment. The scope of the audit shall include all dairy plants and sales offices which are involved in the production or marketing of dairy products in the State of Arkansas. The auditors must be given complete cooperation by all personnel of defendants and shall be given access to all books and records of the defendants.

(B) A detailed description by each defendant as to how the audit will be conducted is to be submitted to the Court and to the plaintiff for approval prior to the initial audit.

(C) As soon as practicable after the anniversary date of this Final Judgment, a report of the findings of the audit shall be filed with the Court, the plaintiff, and submitted to responsible officers of defendants.

F. Federal Register and Newspaper Notices

To assist the staff in drafting the Federal Register and newspaper notices that are required under the APPA, the following are sample notices that set forth the essential information that must be included in each notice.

1. Sample Federal Register Notice

UNITED STATES V. COMPANY A, ET AL.

Proposed Final Judgment, and Competitive Impact Statement

Notice is hereby given pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. Section 16(b) through (h), that a proposed Final Judgment, Stipulation and Competitive Impact Statement (CIS) have been filed with the United States District Court for the Southern District of New York in United States of America v. Company A, et al., Civil Action No. 79-250. The Complaint in this case alleged that three (3) corporations engaged in a combination and conspiracy to fix prices of widgets in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. The proposed Consent Judgment enjoins the defendants from entering into or maintaining, any agreement, understanding, combination or conspiracy with any other person engaged in the production or sale of widgets to fix the price or other terms or conditions for the sale of widgets to any third person. The proposed Judgment further enjoins the defendants from communicating or exchanging with any other manufacturer or seller of widgets any information regarding specific prices of widgets or material from which such specific prices may be computed and from distributing any pricing manuals or price lists used or to be used in computing prices, terms or conditions of sale charged or to be charged for widgets. Each defendant is required to establish an antitrust compliance program which must include reporting to the Department of Justice all communications relating to prices of widgets between its employees and representatives of other widgets manufacturers.

Public comment is invited within the statutory 60-day comment period. Such comments, and responses thereto, will be published in the Federal Register and filed with the Court. Comments should be directed to John Smith, Chief, Trial Section, Room 3200, Antitrust Division, Department of Justice, Washington, D.C. 20530, (telephone: ___-____).

____
Director of Operations

2. Sample Newspaper Notice

Take notice that a proposed Consent Judgment as to Company A, Company B and Company C has been filed in a civil antitrust case, United States of America v. Company A, et al., Civil No. 79-250. The Complaint alleged that three (3) corporations engaged in a conspiracy to fix prices of widgets in violation of Section 1 of the Sherman Act. The proposed Judgment enjoins the defendants from engaging in any conduct, or exchange of information, which would have the effect of fixing, stabilizing or maintaining the prices of widgets or exchanging price lists or pricing material from which the prices of widgets may be determined. Each defendant is required to establish an antitrust compliance program which must include reporting to the Department of Justice all communications relating to prices of consumer bags between its employees and representatives of other widget manufacturers. A Competitive Impact Statement filed by the United States describes the Complaint, the proposed Judgment, the industry, and lists the remedies available to private litigants who may have been injured by the alleged violation. Copies of the Complaint, proposed Final Judgment and Competitive Impact Statement are available on request. Said documents are available for inspection in Room 7416, Department of Justice, Washington, D.C. and at the Office of the Clerk of the United States District Court for the Southern District of New York, New York, New York.

Interested persons may address comments
to John Smith, Chief, Trial Section, Room 3200,
Antitrust Division, Department of Justice,
Washington, D.C. 20530, within the statutory
60-day time period.

In addition to the Federal Register and newspaper notices, the staff should consult Chapter VII, at VII-36, for a sample press release announcing the entry of the proposed consent decree.

VI. Criminal Litigation

A significant portion of Antitrust Division cases that go to trial are cases brought as criminal violations of Section 1 of the Sherman Act. Since criminal litigation is a major enforcement activity of the Antitrust Division, it is necessary to prepare and present criminal cases well.

Although this Section is not intended to set forth all of the issues relevant to proper preparation for a criminal trial, there are a number of common problems and procedures that have arisen in Division criminal cases. This Section sets forth suggested methods that have been employed by the Division in (a) drafting and returning indictments; (b) conducting pre-trial discovery; (c) making and opposing pre-trial motions; (d) preparing trial briefs; (e) selecting a jury; (f) opposing defense motions for acquittal and other post-trial motions.

This Section also discusses the Division's practice of making sentencing recommendations to the court and its procedures for negotiating and entering into plea agreements.

The materials in this Section are intended only as suggested methods of approaching criminal litigation issues. Trial staffs should also consult the Division's Exemplar File, briefs and transcripts from earlier Division criminal cases, the Handbook of the Attorney General's Advocacy Institute, the United States Attorneys' Manual, and Chapter VI, Section II of this Manual, infra.

A. Drafting the Indictment

As a general practice, an Antitrust Division indictment is drafted to include the following parts: (1) a statement and description of the defendants and co-conspirators; (2) a description of the trade and commerce affected; (3) the offense charged; (4) the effects of the offense; and (5) the jurisdiction and venue of the Court. The indictment must be signed by the foreman of the grand jury and by the attorneys for the Government.

The general form of the indictment employed in Antitrust Division cases may be found in previous indictments located in the files of each section and field office, or in the Legal Procedure Unit. Other information concerning specific matters is found at U.S.A.M. 9-12.000 *et seq*.

There are certain matters regarding the drafting of indictments that deserve additional comment.

1. Co-conspirators

Most indictments contain a general statement that:

> Various firms and individuals, not made defendants in this indictment, have participated as co-conspirators with the defendants in the offense charged, and have performed acts and made statements in furtherance thereof.

As a general practice, the Antitrust Division will not prepare an indictment naming unindicted co-conspirators. The practice of naming unindicted co-conspirators has been criticized by a number of courts. *United States* v. *Briggs*, 514 F.2d 794 (5th Cir. 1974); *United States* v. *Chadwick*, 556 F.2d 450 (9th Cir. 1977). The naming of unindicted persons as co-conspirators may be viewed as denying those persons due process since the named person is deprived of the opportunity to challenge the correctness of the grand jury's accusations at trial.

There is ordinarily no reason to name unindicted co-conspirators to achieve any legitimate prosecutorial interest or duty. It is sufficient to allege that there were co-conspirators who participated in the offense charged. In appropriate cases identity of the co-conspirators may be supplied in a bill of particulars.

In the absence of a sound reason, such as the fact that the person's conspiratorial involvement is a matter of public record or public knowledge, unindicted co-conspirators should not be named in the indictment. See U.S.A.M. 9-11.225.

2. Interstate Commerce

The interstate commerce allegation is critical since it may be the basis for a motion to dismiss the indictment or a motion for judgment of acquittal. Staff should develop a commerce theory based on the facts of the case. The most cohesive commerce allegations are based on a clear factual statement of the theory and include a general statement, where appropriate, that the defendants' activities had an effect upon interstate commerce and were within the flow of interstate commerce.

3. Jurisdiction and Venue

The jurisdiction and venue section of the indictment should indicate that the conspiracy was carried out, at least in part, within the district in which the indictment is being returned. It should also establish that the conspiracy was carried out with the statute of limitations ("within the five years preceding the return of the indictment.").

B. Returning the Indictment

The staff should be prepared to summarize the evidence in the case to the grand jury in the session at which it will recommend the indictment. This summary, and any questions the grand jurors may raise, should be recorded by the stenographer under Rule 6(e) of the Federal Rules of Criminal Procedure. The summation should include a description or reading of the indictment, a recitation of the facts of the case based on the grand jury record, and a description of the manner in which the jury will vote on the indictment. Staff also should provide the grand jury with access to the grand jury transcripts and other relevant materials. The staff must leave the room while the jury deliberates and votes. These procedures are outlined in the Grand Jury Manual at 213 to 218.

Upon return of an indictment in open court, summons will ordinarily be issued to each of the defendants. See Grand Jury Manual at 218 to 220.

Upon return of the indictment in open court, the staff immediately should call the Office of Operations and inform them of the fact of return of the indictment. Operations will inform the Public Information Office, which will issue the press release immediately. Staff should not make any statements to anyone concerning the indictment until the Department's press release is issued in Washington.

After Operations is informed, it is customary for the staff to call counsel for each defendant and inform them of the fact of indictment and the date of arraignment, if known. This courtesy is intended to give notice to defense counsel and defendants prior to their receiving notice of the indictment from the news media.

C. The Arraignment

Under most district court local rules, an arraignment will take place on a date certain after the return of the indictment. At the arraignment, staff should be prepared to respond to pleas of nolo contendere, be prepared to discuss the issue of bail or personal recognizance for the defendants, and take a position on such procedural details as photographing and fingerprinting the defendants. Except on pleas of nolo contendere, the Division follows the procedures of the U.S. Attorney and U.S. Marshal.

On the issue of nolo pleas, the staff should make a recommendation to the Office of Operations of its view on the subject. Generally, at the arraignment, the Division will oppose pleas of nolo contendere unless (a) a defendant has offered significant cooperation or has entered into a plea agreement with the Division; or (b) in certain circumstances where all defendants proffer pleas of nolo contendere the Division may, in its discretion, not oppose the pleas. Such circumstances are considered on a case-by-case basis.

At arraignment, the court may establish a briefing schedule for pre-trial motions and set a trial date. The staff should be prepared to state its timing considerations in such circumstances. Under normal circumstances the staff should argue for an early trial date.

D. Pre-Trial Discovery and Motions

The local rules in most districts set a timetable for pre-trial criminal discovery and motions practice. In some circumstances, the local rules establish an informal discovery conference to take place within a certain period after arraignment.

Because of the timing of these conferences and the desire to expedite the pre-trial procedures, staff should have evaluated what information it is required to disclose to the defendants and prepare to have the information available as soon as practicable. The typical requests for pre-trial discovery that are made by defendants at this stage may include the following.

1. Statements of the Defendant

Under Rule 16(a)(1)(A) of the Federal Rules of Criminal Procedure, defendants are entitled, upon request, to all of their prior statements. The Rule applies to all written or recorded statements of individual defendants, including their grand jury testimony, if any. In the case of corporations, the Rule provides that the corporation may obtain the relevant recorded testimony of any witness before the grand jury who (1) was, at the time of the testimony, so situated as an officer or employee as to have been able legally to bind the defendant in respect to conduct constituting the offense; or (2) was, at the time of the offense, personally involved in the alleged conduct constituting the offense and so situated as to have been legally able to bind the defendant in respect to that alleged conduct in which he was involved.

In essence, the rule requires that the grand jury testimony of all officers and employees of the defendant corporation should be disclosed, if the defense counsel represents that those individuals could bind the corporation in the crime charged.

2. Prior Criminal Record of the Defendant

Rule 16 (a)(1)(B) of the Rules provides that the defendant's prior criminal record should be made available to the defendant. In anticipation of this, staff should request FBI assistance to obtain the prior record of each defendant, and check with the Legal Procedure Unit and Files Unit to determine the past criminal antitrust record of the corporate and individual defendants.

The Division staff should provide this material to the defendants after the FBI and Division checks are completed.

3. Documentary Discovery

Under Rule 16(a)(1)(C), a defendant, upon request, may obtain access to books, papers, documents, photographs, etc., within the possession of the government which are material to the preparation of the defense or are intended for use by the government as evidence in chief at trial, or were obtained from, or belong to, the defendant.

Under this Rule, the Division staff will arrange to make available its trial exhibits to the defendants on a certain date before trial.

When the Division arranges for disclosure of government trial exhibits under this Rule, it should invoke the provisions of Rule 16(b)(1)(A) and obtain a commitment from defense counsel in writing for reciprocal discovery of all trial exhibits of the defense by a date certain prior to trial.

Defense counsel may argue that they cannot determine what materials they will use at trial until the close of the government's case. The Division may face the same situation, *i.e.*, that the government cannot predict exactly what exhibits will be used until the case is underway. Since the Division is ordinarily in a situation requiring it to turn over all proposed exhibits, the same is required of the defense. Staff may argue that the defense should provide all proposed exhibits to the government in the same fashion as the Division must provide its proposed exhibits to the defense.

Failure of the defense to comply in good faith with this reciprocal discovery provision of the Rules should be raised with the count prior to trial. This is especially relevant in situations where the defendants plan substantial expert economic and statistical evidence.

The meaning of documents "material to the defense" has been interpreted in various ways by the courts. The determination of what must be disclosed to the defense under this provision depends upon the facts of each particular case.

4. Discovery of Reports of Examinations and Tests

Under Rule 16(a)(1)(D), defendants may obtain results or reports of physical or medical examinations or scientific tests and experiments that are material to the preparation of the defense or intended for use by the government as evidence at trial. During the course of antitrust investigations and trials, such materials are generally not employed. However, in the event that such materials are available, the government should move for reciprocal discovery under Rule 16(b)(1)(B) as indicated in Section D(3), supra.

5. Materials Not Subject to Discovery

Under the Rules, internal memoranda of the government, grand jury transcripts other than those provided for in 16(a)(1)(A) and other statements of potential government witnesses are not subject to disclosure during pre-trial discovery.

Statements of government witnesses are discoverable under the Jencks Act, 18 U.S.C. § 3500. Jencks Act materials are subject to production only at trial; however, arrangements may sometimes be made to provide Jencks Act materials to the defendants at some reasonable time prior to trial. See Section E(2)(a), infra. The names and addresses, and prior criminal records of government witnesses may also be produced at trial.

6. Motions for Bill of Particulars

Defendants will usually move pursuant to Rule 7(f) of the Federal Rules of Criminal Procedure for a bill of particulars. Generally speaking, defendants' motions for a bill of particulars are within the discretion of the court. The Antitrust Division may prepare a voluntary bill of particulars for the defendants setting forth information relevant to the conduct of the case.

Although response to a motion for a bill of particulars is considered on a case-by-case basis, the general rationale for the Division's opposition to a bill is that the indictment provides the defendants with a basic statement of the charges against them and discovery under Rule 16 provides sufficient information for defendants to adequately prepare a defense, to avoid surprise at trial, and to protect the defendants against a second prosecution for an inadequately described offense.

Examples of motions in opposition of a bill of particulars and sample voluntary bills of particulars are found in the Exemplar File at Numbers 43 and 44.

In addition, defendants have sometimes moved to seal the bill of particulars, if one is voluntarily provided or ordered by the court. The Division will generally oppose motions to seal the bill. See Exemplar File at Numbers 5, 7 and 122.

7. Motions to Dismiss the Indictment

In general, there are numerous grounds on which defense counsel may make motions to dismiss the indictment. These include the fact that (a) the indictment does not charge an offense under the statute, (b) the indictment, or the statute, is unconstitutionally vague and indefinite, (c) the indictment does not fully advise the defendants of the charges against them or (d) the indictment is defective because of grand jury abuse. It should be noted that the motion to dismiss the indictment is limited to allegations relating to the four corners of the indictment, such as lack of jurisdiction, failure to allege the elements of the defense and vagueness of either the indictment or the statute. In addition, defendants may attempt to establish that there is an insufficient evidentiary basis for the indictment or raise other factual questions relating to the sufficiency of the indictment or procedural problems relating to the conduct of the grand jury. Such motions often are not proper motions to dismiss the indictment since they relate to factual issues that will be developed during the course of the trial. The Division has responded to each type of motion to dismiss. Examples of such responses can be found in the Exemplar File as Exemplar 40 (vagueness of indictment and statute); 52 (grand jury abuse); 53, 69 (element of intent not alleged); and 100 (selective prosecution).

8. Motions for Severance

Defendants, especially in conspiracy cases involving numerous defendants, will often move for severance pursuant to Rule 14 of the Federal Rules of Criminal Procedure. In Sherman Act cases, defendants usually move for severance on the basis that evidence against co-conspirators will be introduced at trial and the moving defendant will be prejudiced by such evidence.

Generally, in a criminal antitrust case, the conspiracy in question involves all of the defendants and evidence will be introduced that each defendant knowingly joined the conspiracy.

The Division will generally oppose a motion for severance on grounds that a single conspiracy occurred and that the proof relates to the conduct of all defendants. As a practical matter, under the co-conspirators declaration exception to the hearsay rule, Fed. R. Evid. 801, evidence relating to the activities of one defendant may be admissible against all defendants once the conspiracy is established and each defendant is linked to the conspiracy. Examples of Division responses to severance motions are found in the Exemplar File at Numbers 28 and 70.

9. Motion to Fix the Order of Proof at Trial

Defendants may move to fix the order of proof at trial. Defendants generally will argue that the conspiracy must be demonstrated and each co-conspirator must be shown to be a member of it by independent evidence before any co-conspirator declarations are admitted into evidence against a co-conspirator. The Division generally opposes such motions, since such a requirement would make orderly presentation of the case difficult, if not impossible. The law of various circuits sets forth the analysis the court will require in developing the order of proof. Staff should be familiar with the circuit practice in determining the best manner of answering such motions and presenting evidence during the trial.

Examples of motions to fix the order of proof are found in the Exemplar File at Numbers 128 and 129.

10. Other Defense Pre-Trial Motions

In general, there are many pre-trial motions that may be made in the circumstances of specific cases. Motions for change of venue, motions for materials collected by use of electronic surveillance (see, U.S.A.M. 9-7.700 *et seq.*), motions under the Speedy Trial Act (see U.S.A.M. 9-17.000 *et seq.*), motions to suppress evidence, and similar motions often are made by the defendants during the course of the pre-trial proceedings. The Exemplar File and the Legal Procedure Unit have samples of various types of motions that have been filed and answered in the Division's criminal cases.

11. Motions Filed by the Government

In certain circumstances, the government may wish to file a pre-trial motion as well. These motions may include the following:

a. Motions Relating to Conflicts of Interest by Counsel

In many circumstances, defense counsel endeavor to represent more than one defendant or a defendant and government witnesses at trial. The Division should attempt to establish the conflict of interest that counsel may have and file appropriate motions, if necessary. Before filing such motions, the staff should consult with the Office of Operations. Generally speaking, the government would ask for a hearing at which time the individual defendant may be questioned about actual or potential conflicts of interest. Under most circumstances, the Division will argue that the same counsel could not represent a corporation and an individual, represent two individuals in the same corporation, or represent a defendant and a potential government witness. The reasons have been stated by Division officials over the years. *See e.g.*, Richard J. Favretto, "The Perils of Multiple Representation in Criminal Antitrust Proceedings," Chicago Bar Association, May 3, 1977. *See also* Exemplar File Numbers 14 and 124.

b. Other Government Pre-Trial Motions

To avoid specific problems of evidence or procedure at trial, government counsel may wish to raise various issues with the court prior to trial by motions *in limine*. Such motions may be employed to obtain a court ruling on applicability of certain types of evidence, either testimonial or documentary, prior to trial, or to obtain an order that would prevent or limit certain defense actions during trial. Motions *in limine* may be especially helpful in assuring the orderly presentation of trial evidence. Rulings may assist the government in knowing what it may comment upon in opening statements and what lines of testimony will be allowed by the court. Examples of such motions include the manner in which the Court will handle witness invocation of the Fifth Amendment and use of immunity orders, arrangements for offers of proof and stipulations and motions relating to government and defense use of statistical and other expert evidence.

E. Issues Relating to Criminal Trial Procedure

Several significant issues relating to trial procedure and evidence should be considered by the staff in advance of the trial. These issues and procedures provide the staff with a reasonable expectation of what will happen during its trial presentation and what issues may be raised on appeal.

1. The Speedy Trial Act

Antitrust Division staffs should be aware of the provisions of the Speedy Trial Act, 18 U.S.C. §§ 3161-3174 and the specific local plans to implement the Act established in each district. The staff should consult with the local U.S. Attorney to determine the local practice and should always be cognizant of the time periods applicable under the statute.

2. Disclosing Materials to the Defense

The government is required by statute and case law to disclose certain information to the defense at or before trial. The major focus of these disclosures relates to the Jencks Act, 18 U.S.C. § 3500 and the provisions of Brady v. Maryland, 373 U.S. 83 (1963).

a. The Jencks Act

The Jencks Act, 18 U.S.C. § 3500, requires that the government disclose to the defense all statements made by government witnesses after the witness has completed direct examination. In practice, the government, especially in a complex case, may disclose such materials a certain amount of time prior to the direct examination of the witness to prevent unnecessary delay at trial.

The Act defines the term "statement" to include written statements made by the witness that are signed or otherwise "adopted or approved" by the witness, a substantially verbatim recital of an oral statement that is recorded contemporaneously with the statement, and any grand jury testimony of the witness.

In addition to prior grand jury testimony, "statements," as defined in the Act, clearly include any depositions, signed statements, or similar materials relevant to the testimony. It does not include, under normal circumstances, the work product of Division attorneys in interviewing witnesses' prior to their testimony.

In preparing a witness' testimony for trial, the staff should be familiar with Goldberg v. United States, 425 U.S. 94 (1976), where the Supreme Court held that interview notes that were adopted or otherwise approved by the witness may be disclosed to the defense under 18 U.S.C. § 3500. In at least one other situation, the notes of a staff attorney that placed alleged witness statements in quotation marks have also been ordered disclosed as verbatim statements of the witness.

Although each attorney has a personal style of witness preparation, it is always the better practice for the staff to prepare questions in advance of the interview and take few, if any, notes during the session. When notes are taken or where the attorney is revising the prepared questions during the interview, staff attorneys should inform the witness of the reasons why they are writing during the interview.

b. Brady Material

There is still considerable debate as to the full meaning of Brady v. Maryland, 373 U.S. 83 (1963). Brady held that the prosecution's suppression at trial of evidence favorable to the accused, bearing either on the issue of innocence or punishment, is a denial of due process. See Giglio v. United States, 405 U.S. 150 (1972); Giles v. Maryland, 386 U.S. 66 (1967), and United States v. Conder, 423 F.2d 904 (6th Cir. 1970).

It is advisable to consult with the local U.S. Attorney to determine the U.S. Attorney's practice regarding Brady material. See also Exemplar File at Number 120.

One area where the determination of what would be helpful to the defense appears to be straightforward is providing the defendants with the past criminal records of government witnesses. Staff should obtain such information when it requests an FBI search of the criminal records of the defendants. The materials may be turned over immediately prior to trial.

3. Trial Briefs

In most criminal cases, the court requires a brief setting forth the theory of the government's case, the factual basis of the government's proof, and various legal issues that may arise at trial. On occasion, the brief also may also be the proper place to list the government's witnesses and trial exhibits.

The trial brief should be submitted to the Office of Operations for review prior to submission to the Court.

The U.S. Attorney in the district also should be consulted as to form and content of the trial briefs submitted to judges in that district.

4. Voir Dire Procedures

Jury selection in the federal system is governed by Fed. R. Crim. P. 24. Because the manner of jury selection varies among the districts and even among judges within a district, the trial staff should consult with the U.S. Attorney to determine the procedure used by the judge assigned to the case. Staff also should discuss jury selection with the judge at a pre-trial conference to determine specific procedures and manner of inquiry.

When jury selection begins, it is recommended that a staff that is unfamiliar with the region from which the jury array is drawn ask an experienced Assistant U.S. Attorney to assist the staff in selecting jurors.

The Handbook prepared by the Attorney General's Advocacy Institute has suggestions for effective jury selection procedures and practice.

5. Trial Procedures

The conduct of a criminal trial is based in large measure on the procedures and preparation that occurred prior to trial. The Handbook of the Attorney General's Advocacy Institute provides samples and suggestions of opening statements, direct and cross examination, expert witnesses, use of documentary evidence, rebuttal evidence and closing arguments.

It should also be emphasized that the local U.S. Attorney's Office may provide valuable assistance concerning local practices and the manner in which each judge conducts trials. This is especially important regarding the judge's manner of handling opening statements and closing arguments, trial objections and conferences outside the hearing of the jury.

6. Jury Instructions

Under Fed. R. Crim. P. 30, both the government and defendants are permitted to file proposed points for charge with the Court. The Division generally files a rather comprehensive set of instructions. It is often helpful to consult the instructions suggested in E. Devitt & C. Blackmar, Federal Jury Practice and Instructions (3d ed. 1977) as well as on past instructions used by the Division in similar cases. The local U.S. Attorney should be consulted on the practice of the district, or of particular judges on requesting instructions and their format. Where possible, the Division's instructions should be supported by case law and other authorities.

Because of the significance of jury instructions to the appellate disposition of a criminal case, the Division's instructions should be grounded on established case law and, where possible, language that was earlier upheld by the appellate courts.

The Legal Procedure Unit maintains copies of the Division's past proposed instructions in the docket files of each case. In addition, samples of particular instructions used by the Division may be found in the Exemplar File at Number 12.

7. Defense Motions for Acquittal, New Trial and Arrest of Judgment

Trial staffs should prepare for motions by the defendants at the conclusion of the government's case for judgment of acquittal pursuant to Fed. R. Crim. P. 29. Rule 29 motions may be renewed before the case is submitted to the jury. If the jury returns a guilty verdict or is discharged without returning a verdict, a motion for judgment of acquittal may be made within seven days, unless the court extends the time for such motions. See Rule 29(c).

Generally, defendants will renew their motions for judgment of acquittal after a guilty verdict, and make a motion for a new trial under Fed. R. Crim. P. 33. Defendants may also make motions for arrest of judgment under Fed. R. Crim. P. 34 if there is an argument that the indictment does not charge an offense or raises an issue relating to the court's jurisdiction.

These motions may require briefing and oral argument. Courts frequently issue opinions when ruling on these motions; therefore, careful preparation in responding to these motions is important since they may affect the appellate disposition of the case.

Sentencing of convicted defendants will not take place until all post-trial motions have been ruled upon by the district court.

F. Sentencing Recommendations

1. Internal Procedures

Soon after the filing of the indictment, the staff should begin to consider its recommendations for sentencing the corporate and individual defendants. These recommendations should take into consideration the Division's sentencing guidelines as set forth at II-96 to II-114, supra.

Staff should set forth its sentencing recommendations in writing, stating, as to each defendant, its size, participation in the offense, extent of cooperation, ability to pay, equitable considerations, and any other relevant matters. In most cases, staff should prepare all recommendations at the same time, since this allows the staff, the Chief, and the reviewers to establish a standard for analyzing the entire case.

Staff should forward its memorandum to the section or field office Chief. The Chief will transmit the staff's views along with his or her recommendation to the Office of Operations. The Office of Operations, the Deputy Assistant Attorney General, and, in appropriate circumstances, the Assistant Attorney General will review the recommendations and determine the final sentence recommendation of the Division. A trial staff should not inform defense counsel of its proposed sentencing recommendation. Upon request by defense counsel, staff may inform counsel of the Division's final recommendation.

While the court may or may not ask the Division for a specific sentencing recommendation as to a company or individual, the staff should be prepared for this possibility. Staff may also consult with the local U.S. Attorney to determine the local practice on sentencing recommendations by the government and on other sentencing matters, such as plea agreements.

2. Plea Agreements

Rule 11(e) of the Federal Rules of Criminal Procedure sets forth the procedures employed in entering into a plea agreement with any defendant. While the Division generally does not enter into plea agreements reducing the charges against a defendant, the Division may, on a case-by-case basis, enter into negotiated plea agreements under either Rule 11(e)(1)(B) or (C).

The staff should consult with the U.S. Attorney for the district to determine the court's practice and procedure regarding plea agreements.

Before entering into a plea agreement, staff should consult with the section or field office Chief to ensure that the plea agreement is consistent with the sentencing recommendation approved by the Division. The Office of Operations should also be consulted before plea agreements are made final.

VII The Appellate Process

Once district court litigation has concluded, or when an order is entered by a district court that potentially can result in an appeal, the Appellate Section should be contacted immediately whether or not the Division prevailed in the district court.

A. Procedures When The Division Did Not Prevail In the District Court

If the Division did not prevail at the district court level, the trial staff should prepare a concise memorandum discussing the critical facts of the case, the proceedings in the district court, and the reasons why the staff believes appeal is either warranted or unwarranted. The issues upon which an appeal, if any, would be based should be discussed in terms of the applicable standard of judicial review. The staff memorandum should be reviewed by the section or field office Chief. One copy of the memorandum should be sent to the Chief of the Appellate Section, who will assign the matter to an attorney in that section, and another to the Office of Operations for its review. Copies of all relevant court orders and pleadings should accompany the memorandum. In addition, a copy of the trial transcript, if any, should be sent to the attention of the Appellate Section attorney assigned to do the initial review immediately.

After the assigned Appellate Section attorney has reviewed the recommendations of the trial staff and obtained the views of Operations, if appropriate, the attorney will prepare a draft memorandum for the Solicitor General either recommending an appeal or recommending against appeal. This draft memorandum, along with whatever memoranda have been prepared by Operations and the trial staff, are then sent to the Deputy Assistant Attorney General for Legislation and Policy Planning who has supervisory responsibility for the Appellate Section. At the same time, copies of the draft memorandum are sent to Operations, to the appropriate Deputy Assistant Attorney General, and to the trial staff.

Final reviewing authority within the Division is exercised by the Deputy Assistant Attorney General for Legislation and Policy Planning or, in certain circumstances, the Assistant Attorney General. The views of the Deputy Assistant Attorney General for Litigation or the Deputy Assistant Attorney General for Regulatory Matters may also be requested by the Assistant Attorney General.

After the Division makes its decision whether to recommend appeal, a memorandum to the Solicitor General reflecting the Division's position is sent to the Solicitor General's Office.

Once the memorandum is received by the Solicitor General's Office, the Antitrust Division's recommendation is reviewed by an Assistant to the Solicitor General and the Deputy Solicitor General with responsibility for Antitrust Division cases. They, in turn, make a recommendation to Solicitor General. At various times, the reviewers in the Solicitor's Office may ask for additional information or may meet with Appellate Section attorneys and the appropriate Division personnel.

In situations where the review process will take some time, the Appellate Section will file, or request the trial staff to file, with the appropriate district court a protective notice of appeal so the Department does not allow the filing period required by the Federal Rules of Appellate Procedure to expire. See Fed. R. App. P. 4.

B. Appellate Activity Where The Division Prevailed In The District Court

Where the Division prevailed in the district court in a criminal or civil case, or where a final order is issued by the court, the trial staff should immediately notify the Appellate Section. At the same time, the Appellate Section should be informed of the general nature of the case and provided with any relevant pleadings by the trial staff. The transcript, if one exists, should immediately be made available to the Appellate Section, and the assigned attorney from the Appellate Section and the trial staff should discuss the matter.

The trial staff normally will be asked to assist the Appellate Section attorneys assigned to the case in designating the record on appeal and determining what parts of the record will be reprinted in the appendix, if there is to be one. The trial staff also may ask to review the draft brief. Finally, in certain emergency situations, the trial staff may be asked to prepare or assist in preparing briefs or other pleadings under Appellate Section supervision.

As a general matter, attorneys from the Appellate Section will handle the briefing and argument of appeals at the Circuit Court level under the supervision of the Chief or one of the Assistant Chiefs in the Appellate Section.

The Chief or one of the Assistant Chiefs in the Appellate Section and the attorney assigned to the appeal will be designated as the attorneys of record in the matter. As such, Appellate Section attorneys should be informed of all relevant issues relating to the appeal and all conversations between the trial staff and counsel regarding issues of the case and the appeal. Conversely, the trial staff should be advised of any meetings of Appellate Section attorneys with counsel concerning these matters.

The Division's response to appellant's brief will, in normal circumstances, be discussed with the trial staff and reviewed by the Chief or an Assistant Chief of the Appellate Section. Finally, the Deputy Assistant Attorney General for Legislation and Policy Planning will approve the brief. At times, the Assistant Attorney General, other appropriate Deputy Assistant Attorneys General and the Office of Operations may become involved in the review process when certain issues of policy arise in the appeal or where conflicting issues must be resolved.

C. Amicus Curiae Participation By The Antitrust Division

At times, a staff in a section or field office may recommend *amicus* participation at the appellate level in a private case. The procedure for making such a recommendation is to prepare a memorandum describing the case and the reasons supporting *amicus* participation by the Division. A copy of this memorandum should be sent to Operations and to the Appellate Section, along with copies of all relevant pleadings. The procedures involved in this process are similar to those employed by the trial staff when the Division is considering appeal. *Amicus* participation must be approved by the Solicitor General. Trial attorneys and staff are encouraged to bring to the Appellate Section's attention matters that may require *amicus* participation by the Division or where the Division's views may clarify, strengthen or advance the law in areas affecting the Division's policy goals.

D. Appeals To The Supreme Court

Once a Court of Appeals has decided a case, the Division may petition for *certiorari* to the Supreme Court or will respond to a petition from the other party in a case in which the Division prevailed. The Division may also file an *amicus* brief in a case for which a petition for *certiorari* is pending before the Supreme Court. Given the time involved in such a petition, the Appellate Section should be notified immediately if it is not already involved in the matter. Appellate Section attorneys, under the supervision of the Chief or an Assistant Chief of the Appellate Section, are responsible for drafting petitions for certiorari, briefs in opposition to petitions for certiorari, and briefs on the merits in Antitrust Division cases, as well as any amicus briefs on antitrust issues.

In Supreme Court cases, the Division's views are presented to the Solicitor General's Office in the same fashion as in cases before Courts of Appeals; however, the Solicitor's Office will generally participate in the preparation of briefs and will argue most antitrust cases before the Supreme Court. Both the Appellate Section and trial staff should assist the Solicitor's Office in the preparation of the briefs and arguments before the Supreme Court.

CHAPTER V

REGULATORY ACTIVITIES

In addition to the Antitrust Division's enforcement role under the antitrust laws, it also acts as a competition advocate, seeking to promote competition generally throughout those sectors of the economy subject to government regulation. This Chapter will set forth the major policies and practices of the Division in regulatory activities.

I. The Division's Role As A Competition Advocate

Competition is the central organizing principle of the American economy and the goal toward which the Antitrust Division's efforts are directed. In most sectors, market forces are the regulators of business activities, subject only to the restrictions of the antitrust laws. There are, however, important exceptions in such major industries as communications, banking, securities, transportation, energy and international trade, where federal regulation -- often accompanied by antitrust immunity -- has been wholly or partially substituted for the discipline of market forces as the arbiter of output and pricing decisions.

In addition to these federally regulated industries, there is an enormous volume of economic regulation at the state level. Some significant examples include professional and occupational licensing, insurance, housing, health care, public utilities and certain aspects of banking, communications and transportation. Although most of its efforts have focused on federal regulatory schemes, the Division also advocates the elimination of anticompetitive state regulatory activity. 1/

A. The Division's Analytical Model

Many regulatory schemes are products of the Depression years, reflecting economic assumptions and conditions that are not valid today. Regulation is, moreover, an imperfect and very costly substitute for natural "regulation" by market forces. Accordingly, exceptions to the general rule of free market competition, protected by antitrust enforcement,

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1/ *See*, *e.g.*, 1977 Department of Justice Report on the Pricing and Marketing of Insurance.

should be permitted only upon compelling evidence that competition cannot work or is inimical to some overriding social objective. Through its program of competition advocacy, the Division seeks to further three goals:

1. To eliminate unnecessary existing regulation;
2. To inhibit growth of unnecessary new regulation;
3. To minimize the competitive distortions caused where regulation is necessary by advocating the least anticompetitive form of regulation consistent with the defined regulatory objective.

In analyzing the need for new or continued regulation, the Division attempts to focus attention on the comparative benefits of free competition on the one hand, and the proposed method of regulation on the other, by asking several basic questions:

1. What are the supposed costs or disadvantages of free competition in the market or industry at issue?
2. If the regulatory scheme is an existing one, have the results of regulation fulfilled its purpose; and, do the underlying economic and social conditions purporting to justify regulatory interference with the marketplace still exist?
3. What are the costs and benefits associated with the [existing or proposed] regulatory scheme? 2/
4. If existing regulation is to be eliminated, what are the necessary elements of a transition from regulated to unregulated status?

2/ Alfred Kahn, who successfully presided over the deregulation of the airline industry as Chairman of the CAB, has suggested that a cost/benefit examination of a regulated market should focus on the degree to which innovation is stifled, whether the monopoly value of regulatory restraints and immunized collective action has been capitalized into the high cost of entry licenses, whether or not industry customers seek to eliminate regulation, whether input prices are inflated and a comparison, if possible, of the regulated industry with an unregulated market. Report to the President and the Attorney General of the National Commission for the Review of Antitrust Laws and Procedures (Jan. 22, 1979) ("Commission Report") Chapter Nine at 188.

Application of such a model to the situations where regulation has been imposed requires that those who favor regulation demonstrate that the benefits to the public of regulation outweigh its anticompetitive effects, and that such benefits cannot be achieved by some less anticompetitive alternative. Where this cannot be shown, the case for regulatory reform, up to and possibly including, the elimination of regulation, is compelling.

B. The Methodology of Competition Advocacy

The Antitrust Division conducts its program of competition advocacy through those of its Sections with expertise in various regulated industries: Special Regulated Industries, Transportation, Energy and Foreign Commerce. While each of these Sections deals with highly specialized sectors of the economy, the means they employ in pursuit of the Division's goals are essentially the same, including participation on Executive Branch policy-making task forces, preparation of testimony on a wide variety of legislative initiatives, publication of reports on regulated industry performance, review of proposed licensing and leasing applications, and intervention in regulatory agency proceedings.

1. Activities within the Executive Branch

The Division's activities within the Executive Branch have included, for example, its ongoing participation in White House and interagency task forces dealing with a variety of regulatory issues arising in such areas as trucking, ocean shipping, energy and export policy. Whether by informal advice or formal comment, the Department of Justice's role in this regard is to advise the President and other government agencies regarding the competitive impact of proposed policy, legislation and agency action.

2. Testimony on Legislative Initiatives

Division officials routinely testify concerning the competitive impact of proposed legislation. Such testimony may support legislation designed to reduce or eliminate unnecessary economic regulation or require regulatory agencies to consider competition in their evaluation of the need for

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new or continued regulation. It may also oppose efforts to extend regulation to previously competitive markets. 3/

3. Publication of Reports on Industry Performance

In addition to its participation on the National Commission for the Review of Antitrust Laws and Procedures, the Division has authored a number of in-depth studies of the competitive performance of various regulated industries including insurance, milk marketing, ocean shipping, and numerous energy industries. 4/ The purpose of such reports is to create greater public awareness of the costs of regulation and thereby to advance reform efforts.

4. Intervention in Regulatory Agency Proceedings

The Division's major competition advocacy effort involves intervention in the proceedings of federal regulatory agencies in an effort to focus attention on competitive issues and to suggest adoption of the least anticompetitive form of regulation where continued regulation is deemed necessary.

3/ See, e.g., Testimony of John H. Shenefield, Assistant Attorney General, Antitrust Division, Before the Senate Committee on the Judiciary Concerning S. 382, the "Competition Improvements Act of 1979" (March 20, 1979); Statement of Donald L. Flexner, Deputy Assistant Attorney General, Antitrust Division, Before the House Subcommittee on Merchant Marine, Committee on Merchant Marine and Fisheries Concerning H.R. 4769, "The Omnibus Maritime Regulatory Reform, Revitalization, and Reorganization Act of 1979" (July 24, 1979); Statement of Donald L. Flexner, Deputy Assistant Attorney General, Antitrust Division, Before the Senate Committee on Commerce, Science and Transportation, Subcommittee on Surface Transportation Concerning S. 796, "The Railroad Deregulation Act of 1979" (June 6, 1979); Testimony of Donald L. Flexner, Deputy Assistant Attorney General, Antitrust Division, Before the House Ad Hoc Select Committee on the Outer Continental Shelf Concerning the "Outer Continental Shelf Lands Act Amendments of 1978" (Dec. 7, 1978).

4/ See, e.g., Reports of the U.S. Department of Justice to the Task Group on Immunities regarding "The Pricing and Marketing of Insurance," "Milk Marketing," and "The Regulated Ocean Shipping Industry" (Jan. 1977).

In the communications area, for example, the Special Regulated Industries Section ("SRI") intervenes in proceedings before the Federal Communications Commission. SRI also serves as a competition advocate in the banking, finance and securities industries, appearing as necessary before such agencies as the Federal Reserve Board, Federal Home Loan Bank Board, Federal Deposit Insurance Corporation, the Securities and Exchange Commission and the Commodity Futures Trading Commission.

The Division's Transportation Section appears before the Interstate Commerce Commission with respect to a wide variety of issues including proposed mergers and acquisitions, entry applications, tariffs, pooling agreements, rate bureau activities and various rulemakings. The Transportation Section also participates in a similar variety of proceedings before the Civil Aeronautics Board and the Federal Maritime Commission.

The Energy Section intervenes in proceedings before the Federal Energy Regulatory Commission, the Nuclear Regulatory Commission, the Environmental Protection Agency and the Interior Department, with respect to competitive issues raised by agency action in the natural gas and regulated oil industries, as well as in various other areas of energy development, production and usage. Merger proposals, pipeline rates, price and allocation regulations, conservation programs, import limitations and environmental standards and restrictions are all issues to which the Energy Section has addressed itself in agency proceedings.

The Foreign Commerce Section's regulatory activities are in the trade policy area, involving appearances before the Treasury Department and the International Trade Commission in antidumping, countervailing duty, escape clause, and unfair competition (Section 337) cases, all of which involve possible exclusion or curtailment of competition from foreign products. Final determinations in both escape clause and Section 337 cases are subject to Presidential review; the Section participates in the interagency groups that formulate recommendations to the President on those cases.

Another important component of the Division's role as a competition advocate in the international arena is its involvement in the development of U.S. trade policy. There are three levels of interagency groups, chaired by the Office of the Special Trade Representative, that develop international trade policy positions. The lead interagency group is the Cabinet-level Trade Policy Committee, on which the Assistant Attorney General in charge of the Antitrust Division sits as the Justice Department's representative. The Foreign Commerce Section provides the staff work for the Department's participation in these interagency groups. In addition, the Section serves as the Department's representative to the Commodities Task Force, an interagency group that develops U.S. negotiating positions for the 19 international commodity agreements ranging from cocoa to tin.

As noted earlier, while the Division's competition advocacy cuts across a vast and diverse cross-section of industries in regulated sectors of the economy, the issues raised in regulatory proceedings tend to involve the same types of questions, e.g., whether competition is feasible, whether an industry is naturally monopolistic, whether cross-subsidies exist and, if so, whether they are desirable, whether economies of scale are substantial, and whether domestic regulation inhibits U.S. firms from effectively competing against their foreign counterparts in foreign markets.

5. Antitrust Review of Proposed Licensing and Leasing

Increasingly, the Antitrust Division, through the Energy Section, is called upon to review and comment upon the competitive effects of proposed licensing and leasing in the energy sector. The Energy Section plays a significant role as a competition advocate through such review and comment.

The manner in which government-owned resources such as coal and oil are disposed of can have a significant impact on competition in the affected industries. The licensing of proposed energy facilities such as nuclear power plants or deepwater ports can act to encourage or discourage competition depending on the nature of ownership, access to, or operation of such facilities.

Division comment and review is presently mandated by statute for the issuance of licenses for deepwater ports by the Department of Transportation, the issuance of licenses and operating certificates for nuclear power plants by the Nuclear Regulatory Commission, the awarding or modification of federal coal leases by the Department of Interior and the awarding of outer continental shelf oil leases by the Department of Interior. In the case of nuclear power plant licensing, the Division participation may take the form of actual participation in the licensing proceedings. For other licenses and leases, the Division files written comments with the awarding agency.

The Division's role in licensing and leasing proceedings is a growing area of competition advocacy that ensures the procompetitive use of government owned resources in the public interest.

6. Litigation Activities

The Sections which are primarily concerned with competition advocacy in regulated industries also have the responsibility for investigating and developing cases in these areas.

Civil antitrust litigation can complement the Division's competition advocacy role. Such cases, under the Sherman or Clayton Acts, can insure that the regulatory scheme does not protect or vindicate a wider scope of anticompetitive activity than is necessary or intended. For example, the Division was successful in litigation to establish that mergers between ocean carriers were not subject to Federal Maritime Commission approval and antitrust immunity under Section 15 of the Shipping Act.

It should be noted, of course, that competition advocacy goals are not relevant to decisions on whether to institute criminal prosecutions. In this area the Division's policy is guided by the same goals employed in the Division's general criminal enforcement policy and the factors enumerated in the Supreme Court's Gypsum opinion.

Litigation activities are described generally in Chapters I and III, supra. Litigation activities in regulated industries are reviewed by the Office of Operations, the Deputy Assistant Attorney General for Regulatory Activities, and the Assistant Attorney General.

II. Procedures Affecting The Regulatory Sections

To ensure the consistent quality of the Division's advocacy before regulatory agencies and to coordinate its varied efforts, all regulatory filings by the Division's Sections are structured in accordance with a set procedure. These activities are coordinated through the Deputy Assistant Attorney General for Regulatory Activities.

Each Section involved in regulated industries files periodic reports with that Deputy and the Assistant Attorney General. These reports, which describe the objectives of each regulatory intervention program and the progress made in respect of each, provide a channel of communication ensuring adequate review, direction and coordination of the Division's overall program of competition advocacy.

A docket of specific matters is maintained by the Deputy Assistant Attorney General that reflects, well in advance of their actual review, the regulatory filings that each Section expects to be making. Each pleading that commences the Division's participation in a regulatory proceeding, states the Department's position on the merits, or raises significant policy issues, is reviewed and signed by the supervising Deputy Assistant Attorney General or, in some cases, by the Assistant Attorney General.

The Sections are expected to observe strict timetables in submitting regulatory filings for review. These papers generally consist of a memorandum for the Assistant Attorney General, describing the issues raised and the Division's intended position, as well as a draft press release summarizing the Division views or action and the reasons for the position.

Except for litigation matters which first go through the Office of Operations, submission of all memoranda, filings and reports should be transmitted from the Section Chief to the Deputy Assistant Attorney General for Regulatory Activities.

* * *

While the competitive problems raised in regulated sectors of the economy are diverse on their facts and many in number, the Division's role in this area is a relatively simple one: to promote reliance on competition rather than on government regulation wherever possible under the circumstances. Thus, while the Division's Sections are expected to apply their detailed expertise in the workings of each regulated industry to each problem presented, they are expected to apply a consistent analytic framework.

[illegible] the competitive problems raised in regional rep- [illegible] Congress are diverse [illegible] can be [illegible] the Division [illegible] in this area [illegible] that [illegible] permits [illegible] than [illegible] possible under the [illegible] issued. Thus, [illegible] factors are [illegible] of each [illegible] procedure, they are [illegible] framework.

CHAPTER VI

INFORMATION SERVICES

The purpose of this Chapter is to briefly describe the information and technical services available to Division attorneys, economists and paralegals in conducting investigations and litigation, and to provide a resource guide to antitrust investigations and cases. This Chapter provides a useful checklist for Division personnel in researching specific issues, obtaining data and litigation support services, employing technical expertise, and obtaining training in various investigation and litigation skills.

I. Information and Technical Services Available in the Antitrust Division

This section describes the various research and technical services available to the Antitrust Division. These include the resources of each section and field office, the Legal Procedure Unit, the Files Unit, the Antitrust Libraries, the Economic Policy Office, the Office of the Chief Financial Analyst, the Information Systems Support Group, and the Division's training program.

A. Section and Field Office Resources

Each section and field office of the Division maintains a substantial volume of resources that may assist the attorneys, economists and paralegals in obtaining information quickly and efficiently. Each section and office receives the major legal materials that report new developments in the antitrust area (e.g., BNA and CCH reports), United States Law Week (Supreme Court and General Law Sections) and various industry and trade journals that relate to the section's or office's assigned commodity and service expertise.

Each section and office maintains a full set of the Division's Exemplar File (see Section G(3), infra), which is updated regularly.

The combined expertise of the attorneys and economists of the Division is, in many ways, the most valuable information resource available within the Division.

B. Legal Procedure Unit

The Legal Procedure Unit (LPU) provides two major services for the Division. First, it coordinates the Division's compliance with the Freedom of Information Act (see Chapter VII, Section VI) and Section 4F(b) of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (see Chapter VII, Section III). Second, LPU serves as the official custodian of the Division's pleadings files and other matters of interest. The Legal Procedure Unit offers investigative and trial staffs access to much of the Division's prior litigation and policy materials including:

(1) the complete pleading files (government and defense) of all Division cases, including trial and appellate briefs;

(2) all court orders, opinions and final judgments in Division cases;

(3) all Division filings with regulatory agencies;

(4) all grand jury pleadings;

(5) all CIDs issued by the Division and the pleading files for all litigated CIDs;

(6) the complete public files of materials submitted in connection with Business Review letters since 1976;

(7) all publications of the Antitrust Division; [1] and

(8) all speeches and testimony given by Division personnel.

In addition, LPU maintains several sets of indices of Division cases -- by commodity, violation, statute, district, and defendant -- as well as statistics on all Division litigation, including days in court, disposition of cases, sentences imposed, and judgments entered.

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[1] See, e.g., 1977 Department of Justice Report of the Task Group on Antitrust Immunities; 1977 Department of Justice Report on the Regulated Ocean Shipping Industry; Department of Justice Report on the Robinson-Patman Act; 1977 Department of Justice Report on Milk Marketing; and 1977 Department of Justice Report on the Pricing and Marketing of Insurance.

All Division staffs are required to furnish LPU with copies of all pleadings (including defendants' pleadings), court orders, opinions, and final judgments and other materials. Such materials immediately should be sent directly to LPU by the section or field office responsible for the matter so that LPU's files are a complete and useful resource.

All of the data and materials maintained by LPU are available to Division personnel. In most instances, a telephone call is sufficient to request LPU assistance. However, for information requests or searches involving complex or sensitive issues, an explanatory memorandum should be submitted for LPU's information and future reference.

C. Files Unit

The Antitrust Division's Files Unit maintains an index of all investigations and cases that the Division has ever conducted. The card index is organized by commodity or service and by each company investigated. These files are particularly useful to an attorney who is attempting to find out whether the Division has investigated a certain industry or company in the past, and the result of such an investigation. This information may be obtained by visiting or calling the Files Unit within the Executive Office. Information relating to all investigations conducted since 1963 has been computerized and is also available from ISSG.

The Division's central files contain all materials that are sent to "files" by Division personnel. The files are organized by DOJ file number.

Division personnel may request specific files from the Files Unit. In many instances, the Division files have been sent to the Federal Records Center and some lead time is necessary to obtain the files from the Center.

D. Library System

There are three Antitrust libraries in Washington and one in each of the Division's eight field offices. All of them are part of the overall Department of Justice library system. The Division's Main Library is located in the 3300 Corridor of the Main Justice Building, and the Star Building Library is located in Room 9312 of that building. The Division also maintains a small library on the 6th Floor of the Safeway Building. The Antitrust libraries contain reporters, treatises, and legal periodicals particularly relevant to the Division's work, as well as trade and business publications necessary to monitor industry activity.

Although book and journal selection is done primarily by the library staff, Division personnel are encouraged to recommend items to be added to the libraries. The extensive collection in the Main Department Library, located on the 5th Floor of the Main Building, is available to Division personnel, as are the specialized collections of the other divisions and offices of the Department.

The principal responsibilities of the library staff are to keep the various collections up to date and to provide reference assistance and specialized information to Division personnel. Typically, this assistance consists of identifying and locating books, articles, and other published information that may contain information useful to an investigation or case. Should a source of information not appear in the Department's library system, the Librarian can refer the user to nearby libraries where the material can be used or the items may be borrowed by the Division Librarian through interlibrary loans. In particular circumstances, the Division's Library staff can perform special, limited research assignments for Division personnel.

Requests for library assistance and suggestions for library purchases should be made initially to the Division Librarian. Depending upon the nature of the request, referral may be made to other parts of the Department's library system or to other government agency libraries.

The Department maintains several JURIS terminals in the Main, Star, and Safeway buildings. Additionally, access to LEXIS and WESTLAW is available in the Main Department library for trained personnel. Requests for training relating to these services should be made to the Division Librarian.

E. Economic Policy Office

1. Purpose

The Economic Policy Office (EPO) provides professional economic assistance to Antitrust Division attorneys and other personnel as part of the Division's enforcement program. Economic assistance should be requested as soon as it appears that a Division investigation, case or regulatory proceeding will involve economic issues of substance.

The economists in EPO should be relied upon to identify and focus the economic issues involved in an investigation or case, assist in the development of the theory of the case, identify and put into appropriate form the data necessary to support the Division's position, and to assist in the development of the trial strategy as it pertains to the economic issues. Among the tasks performed by EPO economists are those of: (a) evaluating the competitive effects of business activities proposed for investigation; (b) analyzing proposed mergers and acquisitions by determining product and geographic markets, identifying potential entrants, and isolating competitive effects; (c) defining relevant markets for studying the structure, conduct and performance of industries and analyzing the economic significance of such structure, conduct and performance; (d) estimating damages sustained by the federal government in its procurement of goods and services because of price fixing and other illegal activities; (e) participating in the preparation of relief necessary to restore competition; (f) testifying as government witnesses in litigation and regulatory proceedings; (g) analyzing the economic effect of proposed consent decree modification; (h) participating in the design of regulatory reform proposals; and (i) collecting and maintaining records of identical bids submitted to federal and state departments and agencies and preparing reports of such identical bids as required by Executive Order No. 10936 of April 25, 1961.

2. Organization

The Economic Policy Office is divided informally into teams corresponding to Division sections and field offices that most frequently require economic assistance. 2/ A senior economist referred to as a "team leader" heads each team and serves as an advisor to team members. Team assignments are flexible, but usually relate to the specific commodity or service expertise developed by each economist on the team. Sections and field offices are regularly informed of team assignments.

2/ The Appellate, Evaluation, Judgment Enforcement and Consumer Affairs Sections and the Office of Policy Planning do not have economists assigned specifically to them. Economic assistance may be obtained by these sections upon request to the Director or Deputy Director of EPO.

The requests that Division attorneys make to EPO are of three types:

(a) Requests for assistance that can be satisfied with a phone call or require approximately one to five days to complete. Such assistance includes identification of trade associations or publications in a particular field or sources of industry sales or market share data. Requests for assistance can be directed to the team leader for the section or field office in question or to any economist assigned to that section.

(b) Requests for assistance requiring approximately 5 to 30 days to complete. Such requests involve the identification of companies in the industry with sales and market share data for review of merger proposals that may require further investigation. This occurs especially in the case of premerger notification filings that require a decision as to whether to issue a second request letter. Requests for this type of assistance should be directed to the appropriate team leader or the Director or Deputy Director of EPO.

(c) Requests for an economist to be engaged on a matter for an extended period of time. Examples of such requests would include cases or investigations that are likely to lead to a case which will require full time economic assistance. Such requests are made to the Director or Deputy Director of EPO.

3. Statistical Services

In addition to providing economic assistance, EPO employs a professional statistician who works with EPO economists and is available to testify on behalf of the government at trials and regulatory proceedings or to critique statistical defense exhibits. The statistician's services may be arranged through the economist assigned to the matter or upon request to the Director or Deputy Director of EPO.

4. Other Assistance Provided by the Economic Policy Office

In addition to supplying assistance to Division attorneys in the form of economists and statisticians, the Economic Policy Office can assist Division attorneys in obtaining economic and related data relevant to a specific investigation.

The Economic Policy Office also maintains a file of affidavits, testimony and exhibits presented by economists and other experts in antitrust cases, regulatory proceedings, and related matters. A current listing of the contents of this file is found in Chapter VIII, *infra*. Access to copies of the testimony may be obtained by calling the Economic Policy Office directly. To ensure the completeness of this file it is the responsibility of Division attorneys to provide the Director of the Economic Policy Office with copies of testimony, affidavits and exhibits presented by experts in antitrust trials and regulatory proceedings. Such materials should not be limited to the government's testimonial evidence, but should include defense testimony and testimony employed in private antitrust litigation and regulatory proceedings.

While economists in the Economic Policy Office are available to serve as expert witnesses in court and agency proceedings, in some circumstances the legal staff may wish to obtain the assistance of an outside economic consultant with special expertise in an industry, familiarity with a geographic area or recognized status in the profession. EPO is available to assist in the selection of individuals with the qualifications required and to assist in their preparation for trial. The staff should make such arrangements as far in advance of the proceedings as possible, and staff should consult the Economic Policy Office, as well as the Executive Office, before it begins negotiations to obtain the services of an expert witness or consultant. *See* Division Directives ATR-1304.1 "Procedures for Obtaining Expert and Consultant Services" and ATR-2110.1 "Employment of an Expert Witness."

F. Office of the Chief Financial Analyst

1. Purpose

The Office of the Chief Financial Analyst consists of the Chief Financial Analyst and support staff and has as its primary purpose counseling and advising the Division on financial matters arising in antitrust enforcement. The Office may be of assistance in the following areas:

(a) "failing company" determinations;

(b) proposed consent decrees in which structural relief is considered;

(c) divestiture assignments, including assessing the viability of the divestiture proposal, locating trustees, and evaluating potential purchasers; and

(d) determination of the ability of a company to pay a fine or damage settlement.

The Office is available to assist trial staffs in preparing Division financial witnesses, to assist in depositions, to prepare Division attorneys to cross-examine financial witnesses, and to locate financial experts.

The Office is also available to prepare affidavits and present testimony on financial matters; however, because of staff size limitations, the Office should not be relied upon to present financial testimony as a routine matter.

2. Resources Available to Division Personnel

As a result of the varied cases in which the Financial Analyst's Office participates, numerous financial background files are maintained on various financial subjects. The Office also subscribes to Moody's Investor Fact Sheets concerning companies listed on the New York Stock Exchange and American Stock Exchange and companies traded in the over-the-counter market, and has available computer programs to retrieve financial profiles on the several thousand companies listed in the Compustat Data Base. 3/

3/ The Compustat Data Base includes a significant amount of financial information about numerous companies for a period of at least 10 years. The type of information maintained includes sales data, balance sheets, profit and loss statements, and various ratios of economic or statistical value. ISSG coordinates the procurement and retrieval of this data.

3. Expert Assistance

It is particularly recommended that the Office of the Financial Analyst be called upon to lend assistance in court proceedings where financial and management witnesses are to be examined. Even in circumstances where a short period of time is available for preparation, the assistance this Office can provide to Division attorneys may be quite effective.

Many requests for assistance require written reports for which court imposed deadlines are set. These should be brought to the Chief Financial Analyst's attention as soon as practicable.

4. Procedures for Obtaining Assistance

Requests for the assistance of the Chief Financial Analyst must be approved by the Chief of the section or field office desiring assistance. Requests should contain the following information: (a) a clear statement of the matter and the assistance sought; (b) the estimated time required and the deadline; and (c) the significance of the deadline (court imposed, etc.). In addition, the Office should be placed on the distribution list for the matter for which assistance is sought.

The Chief Financial Analyst's staff is also available to discuss matters with Division personnel informally.

G. Information Systems Support Group

1. Purpose

The Information Systems Support Group (ISSG) provides Division attorneys and management personnel with technical, centralized assistance in meeting increasingly complex needs for information management and retrieval. Its major functions are:

(a) to assist in establishing systems -- both manual and computer based -- for the control and retrieval of investigation and case-related materials, e.g., documents, depositions, transcripts, exhibits, etc.;

(b) to provide and process data for economic analysis;

(c) to provide computer based management information services such as the Antitrust Caseload Evaluation System (ACES);

(d) to provide an indexing and retrieval system for the work product of attorneys; and

(e) to coordinate the office systems and procedures for the Division, e.g., word processing, dictation and other support staff resource utilization.

2. Investigation and Litigation Support

Division attorneys may contact ISSG for advice on whether investigation and litigation support in a particular case is practicable and helpful. If the task is appropriate for this support, ISSG will work directly with the attorney or economist (1) to outline what needs to be done by ISSG and/or a private contractor, and (2) to estimate the costs and resources necessary. If the section Chief and Director of Operations believe that the project is necessary and useful, ISSG will provide funds and contractor support. Where significant resources are necessary, ISSG may request approval by the Division's Executive Officer or the Deputy Assistant Attorney General for Policy Planning and Legislation.

ISSG personnel are available to assist attorneys with advice regarding document control and techniques for numbering, sorting, and filing documents and other materials. ISSG may also assist attorneys to identify corporate computer records and to arrange for their inspection, selection and use during investigations and litigation. Attorneys and economists may also contact ISSG for assistance in analyzing economic data through use of automated data processing techniques.

3. Attorney Work Product Resources

ISSG is responsible for developing and maintaining systems for the categorization and retrieval of the work product of the Division. It produces and updates the following:

(a) the Exemplar File, consisting of selected Division briefs, memoranda and other filings that are considered excellent models of the Division's work on specific legal issues (a complete set of the Exemplar File is available in each section and field office);

(b) an index to the legal issues found in pleadings, and memoranda and court orders and opinions.

(c) a periodic digest of recent decisions of interest to antitrust attorneys that is sent to each section and field office (Speed File).

The Attorney Work Product Officer should be consulted when specialized work product materials are needed or when Division personnel have ideas of how this Office can be more useful to the Division.

4. Antitrust Caseload Evaluation System (ACES)

ACES is the computer based management information system managed by ISSG. *See* Division Directive ATR-2810.1 "Antitrust Caseload Evaluation System (ACES)" for a detailed explanation of information to be provided to the System and information which may be retrieved from the System.

ACES may be employed by Division personnel to determine whether the Division has previously investigated a certain industry or company. The present data base contains all Division investigations and cases since 1963. Materials in the ACES data base may be obtained by commodity, company or SIC number.

5. Office Automation Program

The Division's office automation program is establishing a coordinated means of processing the Division's work product through use of compatible equipment and introduction of improved office systems and procedures. The Office Automation Program is managed by the Office Systems Coordinator. *See* Division Directive ATR 2830.1 "Office Automation Program" for a full explanation of this program and the services available to Division personnel. The Word Processing Unit of ISSG constantly is re-evaluating the resource needs of the Division with a view to making the most efficient use of Division resources.

H. Division Training Programs

The Antitrust Division offers an extensive program of training opportunities. Opportunities are made available to Division attorneys and other personnel through memoranda issued by the Assistant Attorney General indicating, in advance, the opportunities available, a brief description of the programs to be conducted, and the dates of such programs.

The training programs offered by the Division fall into four broad categories:

1. Attorney General's Advocacy Institute and Other Courses

The Division participates in the Attorney General's Advocacy Institute (AGAI) programs in civil and criminal litigation. These programs help to develop the trial advocacy skills of Division attorneys. In addition, the Division has established a criminal price fixing mock trial in conjunction with AGAI. This four-day program is held once or twice a year to instruct Division attorneys in the techniques of criminal antitrust litigation.

The Division participates in other trial advocacy programs and sends attorneys to the National Institute of Trial Advocacy in Boulder, Colorado, the antitrust program sponsored by Columbia University, and other programs. Each of these programs is held annually and a number of positions are available to Division personnel.

2. Lectures and Seminars

The Division, from time to time, sponsors lecture programs on various topics such as the horizontal restraints program, programs on current developments in merger law, and programs which bring in guest lecturers, e.g., Antitrust Division Visiting Scholar Program.

The Division also provides training in the use of litigation support tools through seminars sponsored by ISSG, as well as training sessions in the use of JURIS and other automated data facilities.

3. Managerial Training Programs

The Division has been active in the Department's program of managerial training. A number of programs of managerial training have been held at the FBI Academy at Quantico, Virginia. These have included specific programs such as power negotiation, creative leadership, and women in management.

4. Videotape Library

The Department and the Division have established a video-tape library containing various training materials.

Included within the library are a series of video-tape lectures by Irving Younger on trial techniques and evidence, and the American Bar Association's Section on Antitrust Law programs on "Representing a Client Before the Grand Jury" and "Trial of an Antitrust Case."

The video-tape library also includes a series of lectures on antitrust economics by Dr. George Hay, former Director of the Economic Policy Office, and the 1978 series on horizontal restraints consisting of four presentations by Division attorneys. These materials are available for use by Division attorneys and may be obtained through the Office of Policy Planning.

5. Application Procedures

Training opportunities and materials are available for Division personnel and are reported periodically in memoranda from the Assistant Attorney General. Generally, training requests must be approved by a Section Chief. See Division Directive ATR-1410.1 "Obtaining Approval of Requests for Training."

Questions relating to training opportunities or procedures should be referred to the Office of Policy Planning.

II. Guide to Conducting Antitrust Investigations

Over the years, Antitrust Division attorneys and economists have accumulated considerable experience in investigating, analyzing and litigating antitrust matters. The purpose of this guide is to describe some general principles and practices that Division attorneys and economists have found particularly useful in the investigation of antitrust matters. Although no two antitrust investigations or trials are identical, and each attorney and economist must develop the approach and style best suited to that person's special abilities, there are enough similarities in the Division's investigations to construct a general analytical framework of how Division attorneys, economists and paralegals gather and use information.

Typically, investigations, at the outset, require a quick accumulation of data about the companies, the industry, and the alleged violation that are the subject of the probe. Section A of this Guide suggests the resource materials that are available within the Division and from public sources.

When an investigation is approved, the need for publicly available information decreases as the staff, through subpoenas, CIDs, request letters, interviews and other methods, assembles more specific information concerning the industry, the companies and the conduct in question. At this stage of the investigation, there is a need for more specialized research and for a technical and practical mode of analysis by which this documentary and testimonial evidence may be obtained. Section B of this Guide suggests a list of useful steps in the investigatory process.

Finally, at the conclusion of the investigation and through the litigation stage, the staff is in need of services tailored to assembling or retrieving the information necessary to the proper presentation of evidence in court. Section C of this Guide describes those services available to Division staffs at this stage.

This analytical framework includes a description of the major information services and technical resources that the Division offers to its investigative and trial staffs. This framework is designed to take the staff from the receipt of a complaint to the completion of the litigation. Although each step will not be necessary in each investigation, the analysis presented will be useful in most situations that a staff will confront during the course of an investigation which may result in antitrust litigation or regulatory proceedings.

This framework is not intended to establish a single methodology of investigation; rather, it is presented to assist the investigator and litigator in learning what resources are available and when the staff should first consider employing such resources.

A. Preliminary Information Sources

When an attorney, economist or paralegal receives an initial complaint that a certain course of conduct or proposed transaction may violate the antitrust laws, there are a number of immediate information sources available within the Division. Basically, these sources relate to previous Division investigations and material which was developed during the course of those investigations, and data sources of trade and industry information which are available through the Library, the Economic Policy Office, and ISSG.

1. Prior Division Investigation and Litigation

The Division's official records relating to past investigations and litigation are a major source of industry and company information. See Division Directive ATR-2710.1 "Maintenance, Destruction and Removal of Antitrust Division Documents." These files are found primarily in the Files Unit and the Legal Procedure Unit.

a. Investigative Files

The Division's Files Unit maintains a card file of all past and present investigations and cases indexed by commodity and company. These cards give a brief summary of the investigation and the companies involved. In addition to the Files Unit card index that covers all Division investigations, the ACES data base, maintained by ISSG, contains indexes by commodity, company and Standard Industrial Classification (SIC) code for all investigations conducted from 1963 to the present. The ACES data base also contains information on various industry screening investigations conducted in the Division's program of analyses of concentrated industries. Once relevant files are identified, arrangements can be made to obtain the records themselves from the Division's Files Unit.

Source of Information: Access to information within the ACES data base may be obtained by calling ISSG. The Files Unit, located in Room 7237 of the Main Justice Building, may be contacted directly to obtain information about investigations and cases and to obtain the files from such investigations and cases.

b. Litigation Files

The Legal Procedure Unit maintains an index, by commodity and defendant, of all Division litigation and regulatory filings, as well as CID and grand jury pleading files. The index refers to the LPU docket files maintained for each matter. LPU also maintains files containing CID document and interrogation schedules.

Source of Information: LPU files may be obtained by consulting the Legal Procedure Unit in Room 7416 of the Main Justice Building.

2. Public Information Sources

In addition to the Division's internal files, there is a large volume of public information that can be helpful at the initial stages of an investigation.

Particularly in merger investigations, a helpful guide to gathering market and market share data at this stage of an investigation is reference to the Standard Industrial Classification (SIC) codes, which are assigned to each commodity. The SIC codes are assigned by the Department of Commerce and are employed in Department of Commerce Publications, the EIS data base, and in various industrial publications, such as Dun & Bradstreet. The codes include a general 4-digit commodity code and are refined to 7-digit codes for a specific commodity or subproduct.

A listing of SIC numbers by number and a cross index by commodity is available in the Antitrust Division Library. The same listing is available in the ACES Code Book which is available in each section and field office.

Useful investigative sources of publicly available information include:

a. Market Share Information. Preliminary market share information should be ascertained at the beginning of any merger investigation. Market share information is available through two major public sources:

(1) EIS data base -- The Economic Information System data base contains three types of information: (a) an alphabetical listing of companies with all 4-digit SIC codes identifying that company's products;

(b) a listing by 4-digit SIC code of all companies in that market and market share data for each company; and (c) a geographical listing, by state and county, for each 4-digit SIC code of each company and its market share.

Source of Information: EIS printouts are available in the main Antitrust Division Library, in each field office library, from EPO and from ISSG. Questions about EIS data should be directed to ISSG which updates the data base and may obtain additional information for the investigator when necessary.

(2) The U.S. Department of Commerce, Bureau of Census reports -- these government publications include the *Census of Manufacturers*, *Census of Retail Trade* and *Census of Wholesale Trade*. Other general sources for market data include Department of Commerce Import/Export Reports and the FTC Quarterly Financial Reports for Manufacturing, Mining and Trade Corporations. These reports provide sales and shipments information in various forms, including Census of Manufacturers information maintained by industry, four and eight firm concentration ratios and other useful information.

Source of Information: These reports are available in the Division libraries and through EPO. Additionally, updated or current information on market shares may be obtained by contacting the Division Librarian and EPO.

EPO maintains a listing of Department of Commerce personnel who are responsible for maintaining updated census information and other industry information. These individuals can be contacted through EPO to obtain new or specialized data.

Division Resource Use: When exploring product and geographic market and submarket information at this stage in the analysis, the staff immediately should consult with EPO to obtain an economic view of the market possibilities. The Team Leader for a section or field office should be contacted directly.

b. Trade Association Information. There are several directories of trade associations that can identify associations serving particular industries or commodity areas. 1/ Once an investigation is approved, the associations themselves often provide information that will help to determine the nature of the market, the companies that are part of that market, and market share data.

Source of Information: The Division Library maintains these Directories.

c. Trade Press. There are a large number of trade periodicals, industry yearbooks, almanacs, and directories that frequently contain information useful at the early stages of an inquiry.

Source of Information: The Division Library maintains these materials.

Division Resource Use: The Library staff can provide bibliographic assistance by locating citations to articles concerning the relevant companies or industries. The bibliographic sources include both printed indexes such as the *F & S Index of Corporations & Industries* and the *Business Periodic Index*, as well as automated on-line bibliographic data bases, such as the *New York Times Information Bank*. Once relevant articles are located, they can be made available or borrowed through interlibrary loan. Requests for such assistance should be made to the Division Librarian.

d. Corporate Information.

(1) General Information -- Several publications offer general data about public corporations relating to officers, subsidiaries, total sales, general corporate history, etc. These sources include Standard and Poor's *Corporation Records*, *Directory of Corporate Affiliations*, Dun and Bradstreet's *Million Dollar* and *Middle Market* directories and *Moody's Manuals*. *Moody's Manuals* provide a compact source of information about each company, including products, plants and recent acquisitions.

1/ *See*, *e.g.*, Directory of National Trade and Professional Associations, and Encyclopedia of Associations.

Source of Information: The various sources of corporate information are available through the Division Library.

(2) Specialized Information -- Dun and Bradstreet publishes specialized Business Information Reports on both domestic and foreign corporations that provide up to date economic and business information about a specific corporation.

Source of Information: Dun and Bradstreet Reports may be requested and obtained through the Division Librarian.

(3) Securities & Exchange Commission (SEC) Filings -- SEC filings for all public companies, including annual reports and 10 K reports, provide useful corporate information, especially relating to the company's perception of its markets, market shares and industry position. These may provide useful comparisons with subsequent documents and materials obtained in preparing for litigation.

Source of Information: ISSG maintains the annual reports and 10 K reports for the Fortune 1000 largest industrial companies. These filings are available on microfiche.

All SEC reports and filings also are available at the Securities and Exchange Commission reading room, 500 North Capitol Street, Washington, D.C. (telephone: 755-4846).

e. Legal Information. The indexes to BNA's Antitrust Trade Regulation Report and CCH's Trade Regulation Reporter can help the investigator determine whether a company or industry has been the subject of antitrust investigations or litigation, by the Division, the FTC, the states or private parties.

JURIS also can run a printout of the company name indicating prior litigation.

Source of Information: The Division Libraries and the sections and field offices have these materials readily available. JURIS facilities are available in the Division Libraries in Washington and the field offices.

B. Information Services and Technical Assistance Available During the Course of an Investigation

By the time preliminary inquiry authority is requested, the attorney already should have looked at much of the publicly available information and have begun to develop a legal theory upon which to proceed. Once authority is granted, the focus shifts to more specialized information on a specific industry, company, or practice. The staff will begin to develop information through voluntary requests and compulsory process from the companies, customers, trade associations and other industry sources.

At this stage, the investigators must consider not only what information will be sought, but how such information is to be stored, indexed and retrieved.

In merger investigations, the staff must work within the time frame of the premerger notification rules in requesting additional information from the companies and in issuing CIDs. (*See* Chapter III, *supra*.)

In investigations that focus on industry behavior, the staff should consider whether the investigation will be conducted as a criminal or civil investigation. This determination, discussed in Chapter III, *supra*, will affect the manner in which the investigation is conducted and the approach the staff will take to the corporations and individuals that could be the subjects of the investigation.

The staff should begin to assess the strategy to be employed in both the investigative and litigation stages of the proceeding. It is never too early for the staff to begin to discuss the type of relief that would be feasible if a case were brought, since, as a practical matter, the reason the Division would bring a case would be to correct or prevent anticompetitive activity.

In price fixing and bid rigging investigations, the staff should also assess the possibility of a government damage case that may result from the investigation. EPO should be consulted to (a) determine if there were significant government purchases and (b) check the Division's identical bid data to determine what information the Division currently possesses on such purchases. [2]

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[2] The information that the Division maintains on identical bids is available through the Identical Bid Unit of EPO.

In essence, planning the investigation will contemplate all of the litigation options available to the staff, as well as an orderly use of the resources available in conducting the investigation.

The Economic Policy Office should be consulted whenever it appears that an investigation will involve economic issues of any consequence. Examples of such issues are product or geographic market definitions, relief options, possible damages and other questions of economic effect. Coordination at the early stages of the investigation allows the economist to think through the issues in order to frame questions to be asked in a subpoena, CID, second request letter or voluntary request, as well as in interviews and depositions. Assistance can be requested through the team leader assigned to the section or field office or the Director or Deputy Director of the Office.

In merger cases where the legal staff usually has a limited time period to obtain information, and to prepare its case, EPO should be consulted as soon as it appears the premerger filing may require a substantial investigation.

1. Resources Available in Planning the Investigation

During the pre-investigative stage, the staff employed public source materials about the industry, the companies, and the structural or behavioral problem that is the subject of the investigation. During the investigative stage, the staff is developing a framework to obtain specific information and focusing the investigation on certain factual matters. In addition, the staff is developing the legal theory and the relief options available in this particular factual setting. In essence, the earlier stage of the effort is strictly educational; now the staff's goal is more strategic -- obtaining information in its best and most efficient form.

The following considerations should be analyzed by the staff at the beginning of the investigative effort.

a. Obtaining Information from Corporate Entities

Whether the investigation is conducted under the premerger notification procedures, by CID, by grand jury or by voluntary requests, it is almost always necessary to obtain information from the corporate entities in the industry that are the subjects of the investigation, as well as those that may have useful information, or may be victims of the conduct (e.g., customers). Although these techniques differ in merger cases and behavioral cases, certain principles apply to either type of investigation in obtaining information from corporate entities.

(1) Noting Unique or Specialized Industry Practices

As the investigator researches the public sources set forth in A, *supra*, the investigator should keep a list of unique industry structural and behavioral characteristics that are discovered. Examples of the types of information that are helpful in Sherman Act investigations include (a) manner in which the product is priced; (b) terms of sale (e.g., delivered pricing, pricing zones, etc.); (c) who in the corporate structure is responsible for pricing, attending trade association meetings, etc.; (d) how sales are transacted (bidding, negotiation, price lists, etc.); and (e) economic factors that affect the industry.

Similarly, in merger investigations, the staff will use the public sources to gather information about (a) the relevant markets and submarkets, both product and geographic; (b) the market shares of the companies; (c) other products produced or considered for production by the companies; (d) the financial condition of the companies; and (3) industry or marketing studies that provide a basic understanding of the markets.

These notes will help the investigator to draft a more focused document request and put the recipient on notice that the Division is well informed about the matter under investigation. It is often valuable to note questions raised during the early stages of the probe in a notebook that will be consulted when drafting document requests.

(2) Consult the Economic Policy Office for Economic Assistance

Before a question of economic consequence is drafted for a subpoena, CID, second request letter, or voluntary request, the investigator should consult with the economist assigned to the matter, or, if an economist is not yet assigned, the EPO team leader for the section of field office. This coordination at the early stages of the drafting process allows the economists to focus on the issues they consider relevant in framing questions to obtain the most useful information in its best form, and to draft questions that consider relief options and damage possibilities.

An economist familiar with the industry also may assist the attorney in sharpening questions about specific industry practices or activities. Cooperation between the attorneys and economists at this stage will result in better information in corporate document submissions and make later working relationships more beneficial.

(3) Consult with the Chief Financial Analyst

When the document request calls for company financial documents relating to justifications for certain types of behavior, or where structural considerations may be affected by the transaction, e.g., failing company defense or divestiture as a relief option, it may be useful to confer with the Chief Financial Analyst to determine what types of information are necessary, how they may be obtained and how requests should be framed to obtain specific data. This may be especially important in a merger investigation at the second request or CID stage.

(4) Consult with ISSG

At the stage when the staff is beginning to frame questions for subpoenas, CIDs or request letters, ISSG's litigation support staff can be of assistance in several ways.

First, if the investigative staff anticipates a large volume of documents, ISSG personnel can advise it about the possibility of establishing a computer data base for the information. Since the mechanics of establishing a computer data base for an investigation require substantial lead time and organization, ISSG should be consulted before the document requests are released so that the options available to the staff are discussed.

Second, ISSG litigation support personnel can help attorneys, on a consultation basis, by suggesting methods of categorizing documents for screening, organization and retrieval. This arises both where there is need for automated data processing support or where manual organizational techniques are implemented. This type of consultation will help attorneys to plan for problems of document organization and retrieval before actual submission of documents. ISSG personnel can also help to frame questions that will result in more organized and effective retrieval.

Third, ISSG personnel can help the staff to determine what type of computer data base the companies themselves may have and how the Division can frame document requests for access to such data. This type of question would be very specialized and technical; accordingly, the data processing expertise of ISSG and the ability to determine the type of computer hardware and software the company uses are important considerations in framing documentary (or interrogatory) requests. Even in those circumstances where the staff is not immediately interested in obtaining access to the company's data base, it is useful to request an explanation of what type of equipment, programs and data base the company maintains.

(5) Consult the Grand Jury Manual Previous Work Product, and Exemplars

The Division has a great deal of expertise in making documentary requests by CID, subpoena or request letter. The Grand Jury Manual and the Exemplar File are among the resources that provide the staff with samples of how the Division has requested similar information in the past.

The Legal Procedure Unit maintains a file of all CIDs issued by the Division, including the document or interrogatory schedules of each CID. The Office of Operations may also be aware of suggested forms of questions, definitions, and other document request strategy, based upon its review of a wide variety of CID and second request letter forms.

(6) Drafting the Documentary Requests

Consultation with the personnel and use of the resources indicated above should assist the staff in drafting a documentary request.

Since the staff is educating itself about the behavior or transaction in question by reviewing documents, the goal of the document request should be obtaining those documents that will assist the staff in developing the case as quickly and efficiently as possible. This is achieved in part by making requests that result in the production of the documents the staff actually wants to obtain. The form of the question, therefore, is important, e.g., subparagraphs that request a specific group of documents are more useful than an "all documents that relate or refer to pricing" type of request. Again, this is a matter that depends on the staff's prior knowledge of the industry and the activity, and specificity is not always possible or practicable.

(7) Organizing the Documentary Submissions

Before the staff receives documents from the recipients of the subpoenas, CIDs or request letters, it should determine how the documents should be organized in the preparation for review and analysis.

It is suggested that the document requests contain a number of specific subsections, and the staff request in its instructions that the recipient number the documents by designated company code, paragraph and subparagraph number, and consecutive numbering within each subparagraph. This greatly assists the staff in organizing the documents upon receipt; it also assists the recipient in maintaining a record of what it has submitted to the Division.

Upon receipt, the documents should be organized and sorted by the attorneys, economists and paralegals to ensure that compliance is complete, copied so that a set may be maintained in their submitted form, and sorted and indexed employing whatever indexing and retrieval system the staff has established. It is advisable to consult with ISSG if any difficulties arise in the indexing system. Documents should be securely maintained in the files of the staff or in a central repository.

Staff may develop a simple retrieval system such as index card retrieval or numbering system for the documents which reference a company, individual or type of transaction. There are a wide variety of techniques that may be used; however, it is most efficient to employ a consistent means of indexing and sorting and to make certain that all staff members have a clear understanding of the process. Consultation with ISSG litigation support staff is always useful at this time.

b. Use of Documents and Materials in the Investigation

Once a staff has obtained documentary information, staff should begin to assemble such information for the interrogation of witnesses in either interviews or by grand jury testimony or CID deposition. Systematic sorting and analysis of the documentary material will assist the staff in determining the strategy of the investigation.

(1) Using Documents to Locate Witnesses

Documentary material is valuable to locate potential witnesses to the transaction under investigation. To assist in this process, always ask for the names and present home and business addresses of all relevant employees of the corporation.

Witnesses are discovered by the submitted documents which they authored, their position within the corporate structure, or their other responsibilities. The strategy differs between merger investigations and behavioral investigations; however, many factors are similar in either type of investigation. In most Section 1 investigations, the investigator begins with the lowest level corporate employees who are knowledgeable about the activity in question or those who offer cooperation.

If the witness is a former employee of the company, and no present address is available, company counsel may be asked if it knows the present location of the witness. The better practice, however, usually is to request that the FBI locate the witness through use of the information presently available to the staff.

(2) Using Documents to Prepare Immunity Requests for Witnesses

The staff should use information derived from documentary and interrogatory responses to prepare information necessary to process witness immunity requests. As is indicated in Chapter III, supra, the Witness Records Unit of the Criminal Division requires a minimum of two weeks from the date of receipt to process an immunity request through the Department's records. In some cases, it may take longer, if the information provided is not complete. The immunity request form, Form OBD-111a, asks for substantial identifying information about the individual, such as home and business address, social security number, and date of birth.

Information obtained through document requests to the companies can facilitate the preparation of immunity requests, thereby saving the staff considerable time in later locating information or in being forced to cancel sessions with the witness because of processing delays in the immunity papers.

Division attorneys have found it helpful to request witness immunity as far in advance of the witness interview or appearance as possible. This allows the staff to develop as much information as possible about the witness before the witness actually testifies. It also allows the attorneys to know for certain that immunity clearance has been obtained prior to making any promises or commitments to the witness or counsel.

(3) Using Documents in Preparing Interviews and Testimony

The staff should know as much as possible about the witness, the witness' company and his or her activities in the transaction in question before staff interviews the witness or takes testimony.

In preparing for a witness interview or testimony, staff should review and evaluate all relevant documentary materials that relate to the witness, including desk calendars, diaries, telephone records, expense accounts and corporate documents prepared by, sent to, and commented upon by the witness.

Many attorneys have found it useful to outline in detail the activities of the potential witness. It is useful to maintain, either in manual form or with computer assistance, a file of documents and materials prepared or written by the witness, as well as the witness expense accounts, desk calendars, etc. It is also extremely valuable when using a litigation support system to search for all prior statements or testimony attributed to the witness to detect any contradictions in the witness's presentation, and, if the strategy requires, to confront the witness with such contrary evidence. Library assistance in finding earlier public statements of the witness may also be useful for such preparation.

During the course of interviews or testimonial sessions, it is most important for the attorney to ask non-leading questions and obtain a full narrative from the witness. The attorney should not seek to impress the witness or counsel with the attorney's knowledge of the witness or of the industry; rather, for later litigation purposes, and for fairness to the witness and others within the industry, the witness should provide a statement in his or her own words.

Such statements are of enormous value in admitting them as past recollection recorded or for impeachment in later proceedings.

When documents are used during the witness's interview or testimony, such documents should always be appropriately marked and verified by the witness as exhibits. In this way, the witness has explained a specific document on the record and may have authenticated it. Copies should be employed for this purpose, and be marked with an exhibit number and initialed by the witness during an interview or testimony.

(4) Using Documents for EPO or Financial Analysis

Documents that contain information that should be analyzed by the economists or Chief Financial Analyst should be provided to those individuals upon receipt. In that way, the economists can contribute to the development of an economic theory of the case and assist in the preparation of witness questions and materials, as well as in interviews and depositions. Economists and financial analysts are considered antitrust "investigators" under the Civil Process Act. See 15 U.S.C. § 1311(d). It is at this time that economic analysis of price and marketing conditions can begin, as well as determination of possible federal damages in a price fixing or bid rigging investigation. Economists can use the documents in developing relief options and theories.

If, upon review, the economist believes that the economic data can best be analyzed by use of data processing equipment, the economists and attorneys should jointly consult with the ISSG litigation support staff.

The economists also will begin to chart out the relevant information in graphic form. EPO can best handle this by preparing the materials in draft form and arranging with the Department's Graphics Section for printing charts and graphs. Requests for graphics work must be processed through the Legal Procedure Unit. Staff should provide at least several weeks for the graphics work to be completed.

c. Use of Legal Resources During the Investigation

Staff should research legal issues that develop during the course of an investigation as soon as it is feasible. This is especially useful in situations where the theory of the case is complex and where further investigative efforts and relief options may be clarified by the case law in the particular area.

The Division has extensive research work product that has accumulated over the years. Some of the best analysis that the Division has prepared in the past is available in the Exemplar File. Requests for particularly complex research assistance may be made to the Chief of the Evaluation Section. Such requests should be specific, relate to an important issue of some complexity, and be made with substantial lead time to allow completion of the project. The Evaluation Section attorneys may also be aware of other situations where a similar problem has arisen. In addition, the Attorney Work Product Office of ISSG and the Office of Operations may be consulted about whether the issue has arisen before and the context in which it arose.

d. Use of Public Sources During the Investigation

As indicated in Section A(2), *supra*, there is a wealth of industry source material that is available through the Division libraries, from interlibrary loan, or from other public sources. As the staff needs more specific information available from public sources, *e.g.*, newspaper and trade press announcements of price changes of corporate policy, the staff should contact the Division Librarian for guidance in locating such material. Various computer data bases may be valuable at this point where the staff can pinpoint the exact data required for the investigation.

The staff is encouraged to consult industry publications periodically during the course of the investigation to determine what practices or policies of the industry may have been altered as a result of the investigation, and what is being reported within the industry about the status of the investigation.

e. Preparation and Retrieval of Testimony, Interview Materials and Documents in Concluding the Investigation

As the staff is interviewing individuals, or taking testimony by either grand jury or CID deposition, the staff should begin to assemble the information into a summary form that is readily retrievable for analyzing the evidence in a fact memorandum, preparing for discovery, and preparing for trial.

If the staff is using data processing assistance and a substantial volume of transcripts is involved in the investigation, staff may wish to have the testimony provided in machine readable transcript for use in the computer data base.

If the staff is employing manual indexing and retrieval, it should begin to digest and reference the transcripts and interviews as the transcripts are received and the interviews are taken. This system also allows the staff to update both its preparation for additional witnesses and its investigatory findings at each stage of the investigation.

While there is no one indexing and retrieval system that is always better than any other, the staff should use one consistent system that is tailored to the needs of the investigation and the personal preferences of the staff. (ISSG is available for consultation in this area).

Indexing and retrieval that begins early in the investigation and continues throughout the process makes it less likely that particular areas or lines of questions will be missed, and makes preparation of the fact memorandum and trial data much less hurried at the end of the investigation.

f. Conclusion of the Investigation

At the conclusion of the investigation, the staff prepares the fact memorandum, as outlined in Chapter III, supra. This will give the staff the final pre-filing opportunity to analyze the case and to prepare its trial strategy. Although the fact memorandum is intended to present the results of the investigation to the reviewers cogently and concisely, it is also a useful mechanism by which the staff is preparing itself for trial. Trial preparation and strategy should be uppermost in the staff's mind as it prepares the fact memorandum.

C. Information Services and Technical Assistance Available at the Litigation Stage

Once the complaint or indictment is filed, the staff's goals shift from compiling information for its use in constructing the case to developing a framework for organizing and presenting the information to the court and the jury.

In many ways, the indexing and retrieval methods developed during the investigatory stage are now most useful. Staff should be prepared to use its investigative knowledge to carve out areas of the case and to use its legal research to mesh law and fact in presenting the issues to the court and the jury.

While most of the information sources indicated in Sections A and B, supra, still are viable, specialized and technical assistance are most valuable at this stage. This section suggests the pre-trial preparation necessary in most Division litigation.

1. Preparation of Expert Economic or Statistical Evidence

Generally, the economists or statistician who have been working with the staff through the investigation -- and have been preparing data for the staff -- will be the staff's experts at trial, either for purposes of being substantive witnesses during the case in chief, possible rebuttal witnesses or consultants to the staff during the expert testimony of the defense. They may also assist in the selection and preparation of outside consultants.

a. Preparation of Exhibits for Economic or Statistical Experts

If the economic or statistical expert is going to testify at trial and employ any type of charts, graphs, or other visual aids, such as pictures or slides, the economist or statistician, together with the staff should prepare the appropriate materials for the Department's Graphics Section. Requests to Graphics must be processed by the Legal Procedure Unit. Graphics should be given as much time as possible to complete their work. Graphics work includes enlargements of documents and similar documentary materials.

b. Preparation of Sound Recordings and Other Technical Assistance

If the staff or the expert needs sound recordings or other technical support such as handwriting or typewriting analysis or fingerprint identification, the staff or expert should request FBI assistance to conduct these projects. Such requests are processed through the Office of Operations, unless the staff has already been working with the FBI on the investigation. In that case, a request to the FBI agents in memorandum form should be sufficient, with a copy to Operations to keep them apprised of the project. In appropriate circumstances, FBI special agents may testify concerning their findings and analysis.

c. Receipt of Economic and Statistical Evidence to Be Employed by Defendants

Staff attorneys and economists should always attempt to obtain, as early as possible in the discovery process, the exhibits, back-up data, and other relevant information that the defense experts are likely to use. This assures the staff that there will be adequate time to study and analyze the material, especially where the defense is relying on computer based data or statistical samples. EPO, through its economists, statistician and research assistants, can assist the staffs in developing this information for use in cross-examination and for other purposes.

d. ISSG Support for Computer Based Information

If the Division will employ computer based economic or statistical information, the legal staff, the economists and statisticians and ISSG should develop the method of presentation at the earliest stage possible. As with other ISSG litigation support, the process should begin at the earliest point possible, preferably during the investigation. Early consultation is necessary since the materials must be coded, key punched and processed through the computer before it can be usefully employed -- and these functions often require time.

2. Preparation of Documentary Exhibits

At the earliest point practicable, the staff should begin to assemble its trial documents. This is important so that (a) many problems of whether the staff possesses all necessary documentation can be resolved prior to filing suit; (b) authenticity problems under the Federal Rules of Evidence may be resolved by the witnesses; and (c) the documents are ready for disclosure to defendants in compliance with either the criminal or civil rules of procedure.

Whether the staff has used data processing or manual indexing and organization, documents should be identified by number and exhibit stickers placed on each document. Log books should be maintained, indicating the number and description of each document to be admitted, the witness that can admit it, the problems of authenticating the document (from whose files did it come?) and other considerations. Such a log may be computer generated if data processing is employed; if manual indexing is used, a simple log book of lined paper is usually effective. A paralegal or attorney should be assigned responsibility for keeping track of the documents and ordering them for trial. At trial, that same person should indicate which documents have been admitted into evidence, the date of admission, and the transcript reference to admission. This allows the staff to have a record of what has been admitted; and allows for moving admission of all documents expeditiously.

3. Preparation of Trial Witnesses

The staff will usually have pre-trial transcripts of the testimony of a number of witnesses in a typical case arising from a grand jury or CID investigation. Such transcripts should be reviewed in preparing the witness questions for trial and should be available for refreshing the recollection of the witness (F.R.E. 612), admitting past recollection recorded (F.R.E. 803(5)) 3/ and for impeachment (F.R.E. 613).

3/ Note that the reason for asking direct questions in a deposition or grand jury session is chiefly for the purpose of having the questions properly framed if the transcript must be introduced into evidence.

Generally, witness questions should be prepared in detail; however, this is subject to the experience and style of the attorney. If the witness consents to being interviewed prior to trial, the Division attorney should attempt to develop his testimony by the means that will be employed at trial (direct, non-leading questions). At such interviews, attorneys become aware of such factors as memory problems of witnesses and the difficulties in admitting documents into evidence.

Expert witnesses should be prepared by the legal staff with another economist present, if possible. This is highly important, especially when the expert's exhibits are a major factor in the Division's case.

If the witness will not consent to an interview, the best the attorney can do is prepare all the information available, understanding the necessity of confronting the witness (even a government witness) with prior inconsistent statements or refreshing recollection. The Rules provide that an attorney may impeach his own witness (F.R.E. 607).

Staff should always formally request the FBI to check the prior criminal records of the defendants, all potential witnesses for the government and defense, and all co-conspirators. Staff should also consult the Legal Procedure Unit's defendant index to check former Division cases involving the defendants and witnesses. The index to the CCH Trade Regulation Reporter may provide the staff with information about other antitrust cases involving the defendants, including private actions and FTC cases.

4. Information Retrieval During and After Trial

As with the investigative transcripts and documents generated by the grand jury or CID investigation, or by second request letters or voluntary submissions, the trial staff should index and summarize the trial proceedings for several reasons. First, the indexed material may need to be retrieved quickly for specific motion arguments during trial. Second, the material is necessary in responding to motions at the conclusion of the Government's case. Third, the material is crucial for preparing for closing argument. Fourth, the material will form the basis of proposed findings of fact; post trial briefs, civil and criminal; and appellate briefing.

The system employed throughout the investigation, either a computer based system or a manual system, should be continued at trial. Further, it is advisable that one person coordinate this information during trial. The attorney who will make the closing arguments is usually the logical person to supervise this process.

Similarly, documentary evidence that will be employed in motions and arguments should be properly categorized together with the testimonial information.

5. Other Sources of Information During Trial

As with the investigative functions, there is a need at trial to discover specific information that may involve other legal and factual assistance, to obtain specific books, articles or news clippings, e.g., publications of the defendant's expert witness, and to research specialized legal questions. If legal issues arise that may involve significant policy questions, the Office of Operations and the appropriate Deputy Assistant Attorney General should be consulted, and some analytical assistance may be provided by the Evaluation Section.

The staff may also wish assistance in preparing jury instructions; such preparation should include an analysis of other Division jury instructions, samples of which can be found in the Exemplar File.

* * *

This research and technical guide presents the major issues that may arise during an antitrust investigation and trial. While many other factors or issues are significant in particular circumstances, this guide is intended to be suggestive of common needs and problems and may assist a staff in anticipating and resolving problems as quickly and efficiently as possible.

CHAPTER VII

ANTITRUST DIVISION RELATIONSHIPS WITH OTHER AGENCIES AND WITH THE PUBLIC

This Chapter provides a brief guide to the Division's relationships with other agencies of the federal government and with the state governments, as well as relationships with the press and the public. Generally, the Division speaks to other agencies and to the public through its officially designated representatives. It is not the Division's practice to have any Division employee present public views on issues of policy or to provide specific investigatory or litigation information to outside sources. See Division Directive ATR 3000.1 "Communications on Current Investigations and Cases with Outside Parties." Those functions are handled by designated officials as described in this Chapter.

This Chapter discusses the Division's working relationships with other law enforcement agencies, such as the Federal Trade Commission, U.S. Attorneys and State Attorneys General; with foreign governments and international organizations; with members of Congress, Congressional committees and staffs; with client agencies of the Department; and with the public, through press relations, responses to citizen requests, and procedures employed with respect to Freedom of Information requests. If an attorney, economist or paralegal within the Division has specific questions about any of these relationships, he or she should contact that designated person or office that can provide information or advice about the transaction.

I. Liaison with the Federal Trade Commission

The Antitrust Division and the FTC have concurrent statutory authority to enforce Sections 3, 7, and 8 of the Clayton Act. Judicial interpretation of Section 5 of the FTC Act permits the FTC to challenge conduct that also may constitute a Sherman Act violation, and thus, there is a potential overlap with the Division in this area as well. This overlapping antitrust enforcement authority necessitates coordination between the two agencies to ensure both efficient use of limited resources and fairness to subjects of antitrust investigations.

Traditionally, duplication of investigations has been avoided in two areas. First, the Department has as a matter of practice referred all Robinson-Patman Act matters to the FTC for action, and, second, the FTC routinely refers possible criminal violations of the antitrust laws, such as price fixing, to the Division. (The procedure to be followed on criminal referrals will be discussed infra.) The two agencies enforce the balance of the antitrust laws concurrently.

A. FTC Liaison Clearance Procedures

Coordination is accomplished through the "clearance," or "FTC liaison" procedure. This procedure was established pursuant to an interagency agreement to determine, as each case arises, which agency would be the more appropriate one to handle the matter. The first interagency agreement was informally instituted in 1938 and, since 1948, it has been modified and formalized by several exchanges of correspondence between the Assistant Attorney General for Antitrust and the Chairman of the FTC. The agencies have agreed to seek clearance from each other in the following instances: (1) where either proposes to investigate a possible violation of the law and (2) where either receives a request for a statement of agency enforcement intentions, i.e., the Division's Business Review or the FTC's Advisory Opinion procedures. Under the liaison agreement, neither agency may begin an antitrust-related investigation until clearance is granted.

1. Clearance Procedures

In the Antitrust Division, clearance of proposed investigations is handled by the Office of Operations. One of the Special Assistants in that Office, in addition to his or her other duties, is designated Liaison Officer, and supervises the FTC Liaison office staff. The clearance procedure operates as follows: when the FTC wishes to investigate a particular matter, it requests, through its liaison officer, the Division's clearance for the proposed investigation. This request is initially made by telephone communication and confirmed through a clearance request form directed to the Division's Liaison Office. For a typical investigation, the clearance request form specifies the firms to be investigated, the product line involved, and the potential offenses.

The Division's Liaison Office circulates the FTC's request for clearance form to all section Chiefs who may have an interest in the proposed investigation. Field offices are called by the Office's Special Assistant in the Office of Operations to determine whether the office has an interest in the investigation. Each section Chief may object to clearing the investigation, agree to clear it, or seek additional information about the FTC's proposed investigation. Requests for additional information about the FTC's proposed investigation should be made to the Division's FTC Liaison Officer, who will either obtain additional information from the FTC or refer the Chief to the FTC attorney requesting the clearance. The request for clearance should be returned to the Division's FTC Liaison Office expeditiously, as it is a part of the permanent record of the request. In addition, the Liaison Office staff checks the clearance request against records of current and past Division investigations. If the interested section Chiefs do not object and the search of the Division's records reveals no conflict, clearance is granted to the FTC. A clearance request that generates no objections or conflicts is usually processed within a few days. It is thus essential that section Chiefs and staff attorneys act on the clearance request as quickly as possible to avoid unnecessary delay.

Similarly, clearance with the FTC of proposed Division investigations is also the responsibility of the Division's Liaison Office. The clearance function is one aspect of the Office of Operations' responsibility to approve and supervise investigations undertaken by the Division. The Division's clearance request is submitted to the FTC, where it is processed in the same manner as the Division processes FTC requests. At the same time, copies of the preliminary inquiry request are circulated within the Division to sections that have investigative expertise in the commodity area. This is designed to ensure that no other Antitrust Division section or field office is conducting a similar investigation or an investigation which could be compromised in any way by the proposed investigation.

Clearing proposed investigations with the FTC usually takes three to five days. Clearance of urgent matters normally can be expedited at the request of either agency.

This clearance procedure has not been significantly affected by the newly implemented premerger notification program established by the Hart-Scott-Rodino Antitrust Improvements Act of 1976. If either agency learns of a proposed transaction before premerger notification has been given and is interested in investigating the matter, clearance can be sought immediately. If neither agency has received clearance when a premerger notification is filed, both agencies take a preliminary look at the notification form to determine whether clearance will be sought. If clearance is sought, the normal procedures are followed.

2. Standards for Objections to Clearance

Objections to an investigation proposed by the other agency can arise on various grounds. Substantially identical investigations may be under consideration in each agency. One agency may have developed what it considers to be a high degree of expertise regarding a particular firm, industry or type of conduct. Thus, it may argue that it should pursue the matter for which clearance was sought even though the other agency first proposed the investigation. Also, an agency may resist clearance because it has pending litigation or a decree involving the same general area or industry proposed for investigation.

The standards applied in resolving these conflicts are fairly informal. However, several factors are considered in the final clearance decision:

> (a) the existence within the agency of current or past investigations or cases involving identical companies or products and similar or related conduct; (b) necessity for immediate action; (c) type of conduct involved in the proposed investigation; (d) an agency's general background in the industry; and (e) the existence within one agency of investigations or decrees which may be interfered with if the other agency proceeds. Memorandum on FTC Liaison, from Richard J. Favretto, Liaison Officer, to Walker B. Comegys, Acting Assistant Attorney General (June 26, 1972).

In addition, if one agency has undertaken substantial preparatory work (such as research in public sources and complainant interviews) specifically related to a single violation, that agency will probably receive clearance for the full-scale investigation of that violation. Finally, the availability and proper use of resources within the two agencies is also considered in the clearance decision.

3. Resolution of Objections to Clearance

If one agency objects to a proposed investigation by the other agency, the difference of opinion is negotiated. The initial step in the event of a conflict is a contact between the Division's FTC Liaison Office and the FTC's liaison to the Division, where each describes the reasons for the respective agency's interest in investigation. The vast majority of the conflicts are settled at this level.

To expedite the ultimate decision on conflicts, a system of weekly meetings of the Division's Liaison Officer and the Deputy Director of Operations with the FTC's liaison to the Division and the Deputy Director of the Bureau of Competition has been instituted. The meetings occur only to resolve conflicts that cannot be resolved by the liaison officers. If the meeting does not resolve the conflict, the Assistant Attorney General or the Deputy Assistant Attorney General for Litigation may enter into negotiations with the FTC Chairman or the Deputy Director of the Bureau of Competition; however, such situations are rare. After a conflict has been resolved, the agency that is to proceed with an investigation will be given access to all relevant information in the other agency's files. This is in keeping with the policy of exchanging information to the extent permitted by law.

B. Criminal Referrals

When a matter is before the Federal Trade Commission and the Commission determines that the facts may warrant criminal action against the parties involved, the Commission will send a written notice to the Antitrust Division and make available to the Division the files of the investigation. The Office of Operations, through the FTC Liaison Office, will refer the matter to the appropriate section or field office for review of the materials and for determination as to whether the matter should be presented to a grand jury. Determination should be made by the section or field office within 30 days of the referral, so that the Division can inform the Commission of its position in timely fashion.

If the Division desires to present the matter to a grand jury, it will request the Federal Trade Commission to transfer the matter to it for such purpose. If, on the other hand, the Division informs the Commission that it does not intend to present the matter for grand jury consideration, then the Commission may proceed with its own investigation.

C. Exchange of Information

As an additional function of the liaison procedure between the Division and the FTC, there is an agreement to exchange information and evidence between the agencies, to the extent permitted by law and internal policies.

If the FTC has conducted an investigation which may involve materials that could be useful in an investigation being conducted by Division, the Section or Field Office Chief should contact the Division's FTC Liaison Office which will make arrangements to obtain access to the appropriate files. If, upon examination, it is determined that copies of any of the materials would be of assistance to the staff, arrangements for copying should also be made through the Liaison Office.

Likewise, requests by the FTC for access to materials in the Division's possession are processed through the Division's FTC Liaison Office. If an attorney or economist receives a direct request for access to, or copies of, Division files, such materials should not be made available until the matter is cleared through the Division's Liaison Office.

II. Relationships with United States Attorneys

In recent years, United States Attorneys throughout the country have taken an active role in prosecuting antitrust violations, particularly price fixing cases of local or regional nature. To encourage cooperative law enforcement, the Antitrust Division has established internal procedures to refer certain potential cases and investigations involving price fixing, bid rigging, or similar criminal conduct, that may violate Section 1 of the Sherman Act to the appropriate United States Attorney. Referrals of this type normally will be made (a) if the case is confined to a local or regional area, or (b) if the amount of commerce involved is of $5 million or less. 1/ When the Antitrust Division becomes aware of matters that may develop into cases of this type, the Office of Operations or the Division field office in the area of the U.S. Attorney's jurisdiction will contact the U.S. Attorney's Office.

Briefly stated, the United States Attorney's Office should inform the Division whether it intends to actively pursue the referred matter. If it does, preliminary inquiry authority must be obtained. The Office of Operations and the Assistant Attorney General must approve the recommendation of the U.S. Attorney's Office to initiate a grand jury investigation, to recommend an indictment, or to close the matter. The request must be made in writing to the Office of Operations and ultimately is approved by the Assistant Attorney General in charge of the Antitrust Division. 2/

Once the matter is referred to the U.S. Attorney's Office, that Office will be responsible for staffing and supervising the matter. Normally, the Division will not supply supplemental staff support, but the Office of Operations and the various field offices will answer any questions or provide technical or legal support to the U.S. Attorney in preparing antitrust cases. The Antitrust Division has also offered training sessions for U.S. Attorneys on antitrust law and investigative techniques.

1/ Assistant Attorney General John H. Shenefield set forth this procedure to all United States Attorneys by memorandum dated April 18, 1978.

2/ The procedures are outlined in U.S.A.M. §§ 7-3.000 to 7-3.610.

The Chiefs of each of the Division's field offices should maintain liaison contact with the U.S. Attorneys within their areas of jurisdiction. Such liaison provides the U.S. Attorney with a convenient contact from which to obtain information about how to conduct antitrust investigations and how to comply with Division procedures and provides the Antitrust Division field office with a ready source of information and support in complying with local procedures and court rules when Division attorneys are conducting investigations and bringing cases within the U.S. Attorney's area of jurisdiction. The relationship is also valuable when Division attorneys seek the assistance of the U.S. Attorney to conduct grand jury investigations in the District and the approval of the U.S. Attorney to apply to the District Courts for immunity orders.

In general, the Division's policy is to maintain good working relationships with all U.S. Attorneys.

If a Division attorney has any questions about the manner of cooperation with U.S. Attorneys' Offices or specific questions about relationships with U.S. Attorneys' Offices, the section or field office's Special Assistant in the Office or Operations should be contacted.

III. Relationships with State Attorneys General

The Antitrust Division is committed to assisting the states in their antitrust activities. The Division believes that such cooperation will result in the overall improvement of antitrust enforcement.

During the past several years, the Division has cooperated with state attorneys general in developing state antitrust programs, in funding those programs, and in providing information that may assist the states in their mission of effective antitrust enforcement.

A. Referrals to and from State Attorneys General

The Division has developed a referral system and maintains a record of those complaints that are (1) received from state attorneys general, and (2) sent to state attorneys general. The Division makes numerous referrals of state and regional investigations to the states in an effort to allocate more effectively the Division's scarce resources and to benefit the states by bringing to their attention matters which occur within their boundaries.

When a matter of regional or local significance is brought to the attention of the Antitrust Division, the attorney who receives the information or complaint should make an evaluation as to whether it should be referred to a state attorney general and discusss it with the section or field office Chief.

When it is determined that a complaint should be referred to the state attorney general, the Chief should refer the matter to the Office of Operations indicating that a referral to the state is appropriate. At that time, the section or field office Chief should send a letter to the state attorney general setting forth the relevant facts and asking the state attorney general to inform the Division of its intention to investigate the matter, or to take no action. The letter should provide a name and telephone number of an attorney familiar with the matter to whom the state can refer additional questions. The letter should not include copies of internal Division memoranda, but may include documents or materials obtained from the complainant. The state should also be asked to keep the Division informed of the subsequent events that take place, *i.e.*, filing a complaint or returning an indictment.

The Office of Operations is informed of such referrals to provide a central record of all matters that are referred to, and received from, the states. This gives the Division a better indication of the progress of state-federal cooperation.

B. Antitrust Division Procedures Under Section 4F of the Antitrust Improvements Act of 1976

With the passage of Section 4F of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, the Division has the statutory responsibility to provide state attorneys general with information, to the extent permitted by law, that may assist them in determining whether to bring a damage suit based upon violation of the federal antitrust laws.

The Division has adopted the following procedures to implement Section 4F consistently.

1. Informing the State of Antitrust Division Suits Under Section 4F(a)

Under Section 4F(a), 15 U.S.C. § 15(f)(a), the Antitrust Division notifies state attorneys general when it believes the state may be entitled to recover damages as a result of the violation alleged in a civil or criminal antitrust prosecution filed by the United States.

In making its judgment in such instances, the Division considers, among other relevant factors, the factual circumstances of the alleged violation, the posture of the state as a potential damage claimant under existing law, and the likely effect of the alleged violation on cognizable state interests.

This notification procedure is not, under the statute, to be equated with routine public announcement of antitrust actions filed by the Division. Rather, this procedure will be utilized when, in the Division's judgment, a state damage action may lie based substantially on the same allegations made in a federal antitrust prosecution. This notification may be recommended by the investigative staff and will be determined by the Director of Operations. The Director will make all notifications to the affected states under Section 4F(a).

Even without specific notification pursuant to Section 4F(a), state attorneys general remain free to explore a potential Clayton Act cause of action arising from any federal antitrust prosecution and to request, under Section 4F(b), investigative files and other materials of the Antitrust Division relevant to that actual or potential cause of action. This data will be made available to state attorneys general under the standards for Section 4F(b) disclosure.

2. Providing State Attorneys General with Investigative Files and Other Materials Under Section 4F(b)

a. Antitrust Division Policy

Section 4F(b), 15 U.S.C. § 15(f)(b), requires disclosure to the state attorney general "to the extent permitted by law" of any investigative files or other materials which may be relevant or material to an actual or potential cause of action under the Clayton Act. The Antitrust Division will disclose materials from its files to assist state attorneys general to the maximum extent possible or appropriate in fulfilling their state antitrust enforcement responsibilities. Thus, as a general practice, a liberal rule will apply to disclosures under Section 4F(b). There are, however, certain instances where, because of statute, case law or other constraints, non-disclosure, or at least protective limitations upon the disclosure made, may be necessary. The Antitrust Division must retain discretion within these areas to make determinations concerning the proper scope of Section 4F(b) disclosures.

This discretion will be exercised to further the overall policies embodied in the antitrust laws and the Hart-Scott-Rodino Antitrust Improvements Act of 1976. These policies favor vigorous federal and state enforcement of the antitrust laws, but occasionally a balance must be struck between immediate disclosure of investigative files and federal enforcement priorities and necessities. While it is the Division's policy to cooperate fully and liberally with state attorneys general, in some instances disclosures may be delayed or limited to preserve the integrity of Antitrust Division prosecutions or investigations.

b. Proceedures Employed in Responding to 4F(b) Requests

Requests for access to investigative files or other materials of the Antitrust Division, pursuant to Section 4F(b), should be made to the Director of Operations who is responsible for responding to such requests. A request from a state attorney general may be made by the attorney general or his designee who shall be an official of the state government, e.g., an assistant attorney general in charge of antitrust enforcement in the state attorney general's office. Requests on behalf of a state should not be made, and will not be honored, if they come from private counsel even though such counsel may be retained by the state for the purposes of considering and filing an antitrust damage action on the state's behalf. See 15 U.S.C. § 15(g)(1).

The response from the Director of Operations to a request made under Section 4F(b) will indicate the general nature of the proposed disclosure and any conditions which may be imposed, such as protective arrangements or limitations on further disclosure. Generally, the Director of Operations sends the state attorney general relevant material such as the indictment or complaint in the case and copies of readily available memoranda, such as requests for preliminary inquiry and requests for grand jury investigation authority. The letter also informs the state attorney general of the Division's intention to disclose relevant non-grand jury material that the state may request, the Division's position regarding disclosure of grand jury materials, and the name, address and telephone number of the section or field office Chief supervising the case whom the state antitrust attorneys may contact for further information regarding the case. Arrangements for the disclosure of investigative files or other materials will be handled by the field office or section Chief.

c. Limitations on Disclosure of Investigative Files and Materials

In response to a Section 4F(b) request, the Antitrust Division will make all relevant files and materials available to state attorneys general with certain exceptions and limitations. These exceptions and limitations are not exhaustive, and peculiar circumstances may require modification or extension of these standards. Any such modification that affects the interests of the state attorneys general under Section 4F(b) will be made known to state attorneys general promptly.

1. Disclosure of Grand Jury Material -- Closed Matters

When the Division's investigative files requested by a state attorney general contain grand jury materials or other data referring to grand jury materials, it is the Division's position that such disclosure is prohibited without a court order pursuant to Rule 6(e) of the Federal Rules of Criminal Procedure. While there may be some dispute whether Section 4F(b) creates an exception to the application of Rule 6(e), the Division interprets Rule 6(e) as covering grand jury materials sought by state attorneys general under Section 4F. This interpretation is justified and warranted by the objectives embodied in the grand jury secrecy rule and such an interpretation is in the best interests of protecting the efficacy and integrity of grand jury investigations as a law enforcement tool.

Notwithstanding this interpretation of Rule 6(e), if the grand jury investigation and any resulting litigation have been terminated, the Division usually will not oppose an application by the state attorney general under Rule 6(e) for disclosure pursuant to Section 4F(b) if the state is contemplating or has initiated suit. In such applications, the congressional intent reflected in Section 4F(b) normally will satisfy the particularized need required for disclosure of grand jury materials under Rule 6(e). There may be, however, some circumstances where particular factors may compel the Division to seek limitations on the disclosure of grand jury materials, even though the underlying prosecution has been terminated. These instances may involve specific hardships upon individual grand jury witnesses or other similar factors. These will be considered on a case-by-case basis, and the Division's position will be explained fully to the states in such instances.

In circumstances where a grand jury investigation is completed, but a resulting prosecution is still pending, the Division ordinarily will resist disclosure of investigative materials under Section 4F(b) until the prosecution is completed at the District Court level. In addition to secrecy considerations, the Division must preserve its litigation posture and, in some instances, disclosure could compromise an effective conclusion of the Division's action.

On occasion, the Division may not oppose a 6(e) request by a state even though its prosecution is still pending, if appropriate limitations on use and further disclosure are provided for and are embodied in the Court's disclosure order. For example, because of the pendency of a criminal trial, disclosure may be made to the state attorney general and his immediate staff solely for their use in preparing a damage action. In such situations, the Division will insist that these materials not be disclosed to any other parties to the litigation or otherwise be utilized until the termination of the federal prosecution. These instances will be dealt with on a case-by-case basis, but generally the Division will not oppose limited disclosure -- as ordered by the court under Rule 6(e) -- if (a) no harm to the Government's prosecution will result and (b) acceptable limitations on subsequent disclosure can be achieved.

2. Disclosure of Grand Jury Material -- Open Investigations

Where the Division has an open investigation, disclosure of investigative files pursuant to Section 4F(b) generally will be denied. The timing of the release of files under Section 4F(b), as distinguished from the ultimate release of such files, is left to the discretion of the Antitrust Division. The effectiveness of the investigation is potentially compromised by making investigative files available during its pendency. As a matter of practice, the Division will deny disclosure of investigative files in all pending grand jury investigations. If a state moves for disclosure of grand jury materials while the investigation is continuing, the Division will oppose such motions.

3. Disclosure of Civil Investigative Demand Materials

Any materials obtained by Civil Investigative Demand will not be disclosed under Section 4F(b). There is no provision in law for disclosure of such data, except where the party from whom the materials are obtained consents to the disclosure. 15 U.S.C. § 1313(c)(3).

4. Confidential Informants

The identity of confidential informants will not be disclosed pursuant to Section 4F(b). The Antitrust Division believes this is necessary to ensure that future cooperation of informants is not impaired, especially since informants often rely on a promise that their identities will not be revealed.

5. Confidential Business Information

Confidential business information is protected from disclosure by federal law. Accordingly, where such information is part of investigative files, that data will not be disclosed to state attorneys general under Section 4F(b).

6. Premerger Notification Materials

All files or materials obtained by the Antitrust Division under the premerger notification provisions of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 are protected by law from disclosure. Accordingly, such data will not be disclosed to state attorneys general under Section 4F(b).

7. Materials Obtained from Other Agencies

Files or materials obtained from the Internal Revenue Service or other federal investigative agencies frequently are protected by law from disclosure outside the Department of Justice. Federal investigative agencies, as a matter of practice, frequently require that the Division will limit disclosure of files or materials generated by those agencies. Therefore, access by state attorneys general to investigative files and material generated outside of the Antitrust Division will be denied unless the agency in question waives the prohibition on release of such files or material and disclosure is not otherwise prohibited by law.

Limitation on disclosure may also be applicable to certain FBI files and materials. Frequently, the FBI conducts or assists in conducting federal antitrust investigations. Information derived from its efforts may be incorporated in Antitrust Division files and, as such, revealed under Section 4F(b). However, raw FBI investigative reports will not be disclosed, as a matter of course, under Section 4F(b) unless the FBI allows disclosure. Recourse to the FBI or other investigative agencies for such data usually may be made by the state attorneys general by direct request or under the Freedom of Information Act.

8. Division Work Product

The Antitrust Division ordinarily will not disclose its work product, analyses and other deliberative memoranda to state attorneys general under Section 4F(b). This is necessary to protect the candor and effectiveness of communications within the Division and to preserve and foster the integrity of its enforcement programs and the recommendations and analyses taken by its staff.

Ordinarily, the limitations contemplated in this area would not result in complete denial of access to investigative files or materials; rather, only limited refusal to disclose particular memoranda or portions of such memoranda will occur. Such refusals also relate to the timing and extent of such disclosure rather than to the fact of disclosure at all.

d. Restrictions on Use of Materials

Other than in the instances listed supra, where limitations may be sought by the Antitrust Division, the Division will not seek to impose additional restrictions on the use by state attorneys general of investigative data disclosed pursuant to Section 4F(b). Under special circumstances, the Division may set other restrictions on investigative data if the need for continued secrecy is paramount.

* * *

The relationships between the Division and the state attorneys general should always be based on the mutual goal of effective antitrust enforcement. Division attorneys should assist the state antitrust offices to the maximum extent, consistent with legal constraints on disclosure and the effect such disclosure will have on the future of federal antitrust enforcement.

IV. Relationships with Foreign Governments and International Organizations

Because of the international nature of trade and commerce in today's world, the Division's work often results in investigations, information requests, or cases that involve foreign governments or foreign corporations that have subsidiaries in the United States.

Because of various international agreements and statutory prohibitions of various nations, the Division must carefully handle matters involving international issues. Such matters should always be brought to the attention of the Foreign Commerce Section.

A. Liaison with the Department of State

1. Purpose and History

The Foreign Commerce Section is responsible for maintaining liaison with the Department of State on all antitrust matters affecting foreign commerce. Antitrust Division Directive ATR 3300.2.

The Foreign Commerce Section normally advises the Department of State of our intentions to initiate an investigation or to file a suit that involves foreign companies, American companies operating in foreign countries or otherwise relates to the interests of a particular foreign country. A general overview of the Division's enforcement philosophy in foreign commerce matters may be found in the Antitrust Guide for International Operations, first published by the Division in 1977.

The Division's first contact point in the Department of State is the Office of Business Practices. Such notification gives the Department of State an opportunity to consider the foreign policy implications of our proposed action and, where appropriate, to facilitate communication of proposed United States antitrust action to the country involved. As a member of the Organization of Economic Cooperation and Development (OECD), the United States has undertaken an obligation to notify antitrust actions affecting other member countries under 1967, 1973, and 1979 OECD Council Recommendations.

2. Procedures

In accordance with Directive ATR 3300.2, any section or field office Chief responsible for a matter potentially relating to foreign commerce should keep the Chief of the Foreign Commerce Section fully advised so that the Department of State, and where appropriate, foreign governments may be notified and provided the opportunity for consultation with the Division.

It is particularly important that the Foreign Commerce Section always be notified prior to contacting foreign witnesses or asking for documents located outside the United States. Direct information requests to foreign governments or foreign nationals may need to be forwarded through the Department of State and the United States Embassy in the country involved. Division attorneys must contact the Foreign Commerce Section if they wish to travel to a foreign country to conduct an interview, obtain documents, or develop any information in an investigation or case. Guidance in these instances should be sought from the Foreign Commerce Section, and such information requests should be discussed with the Chief of that Section. Copies of all documents reflecting actions in foreign commerce matters should be sent to the Foreign Commerce Section.

When a section or field office anticipates authorization to file suit relating to a foreign corporation or foreign operations of an American corporation, the Foreign Commerce Section should be notified at least twelve business days prior to any filing in order to allow adequate time for notification to affected foreign governments which may wish to consult on the matter.

B. Liaison with the Immigration and Naturalization Service

In the past, the Division has had occasion to request that the INS set up a border watch to check for the entry into the United States of potential witnesses in Division investigations and defendants in ongoing proceedings.

These requests should be employed in only the most important matters and should be coordinated through the Office of Operations and the Foreign Commerce Section. Such requests must be approved by the Assistant Attorney General.

C. Cooperation with International Organizations

1. The Organization for Economic Cooperation and Development

The Assistant Attorney General is the Chairman of the United States delegation to the OECD Committee of Experts on Restrictive Business Practices. This Committee meets twice a year at OECD headquarters in Paris and considers problems which are of common concern to the 24 members of the OECD. The United States delegation to the Committee meetings generally consists of the Assistant Attorney General in charge of the Antitrust Division, the Director of the Office of Policy Planning or the Chief of the Foreign Commerce Section, the Director of the Office of Business Practices of the Department of State, a representative of the Federal Trade Commission, and perhaps a representative from the Commerce Department.

2. The United Nations

The Antitrust Division participates in international conferences of the United Nations, including the United Nations Conference on Trade and Development (UNCTAD), to develop international antitrust codes of conduct, a model antitrust law for developing countries, a code of conduct for the transfer of technology, and a general set of rules for the behavior for multi-national enterprises. This work is coordinated through an interagency committee on codes of conduct chaired by the Department of State, and by cooperation with the State Department, the Department of Commerce and the Federal Trade Commission. This work is currently supervised in the Antitrust Division by the Office of Policy Planning, with the cooperation of other sections when needed.

D. Direct Bilateral Antitrust Cooperation and Consultation with Foreign Governments

To further the Antitrust Division's goal of promoting the cooperation of foreign governments in our antitrust enforcement efforts, the Foreign Commerce Section is responsible for seeking and maintaining bilateral understandings with antitrust enforcement agencies in other countries. The Antitrust Division over the past few years has developed close bilateral relationships with antitrust and trade regulation officials of several countries. In certain instances, understandings have been reached on the obligations of states as to notification, consultation, and cooperation in antitrust matters. Such agreements have usually attempted to build on the commonly shared pro-competitive economic values of the major industrial democracies. The Division recently has sought to expand such relationships based on a candid recognition that nations may at times disagree on antitrust enforcement policy, but that the United States is nonetheless obliged to consider and attempt to accommodate legitimate national interests of other nations. Formal written bilateral arrangements exist with the Federal Republic of Germany and Canada. In addition, developing relationships of a less formal nature are maintained with Japan, France, Australia, Mexico, and the European community. The work relating to bilateral meetings is usually supervised by the Foreign Commerce Section with the cooperation of other sections as needed.

E. Competition Advocacy in United States International Trade Policy and Regulation

The Foreign Commerce Section is charged with monitoring the formulation of United States international economic policy for competition advocacy opportunities. The Antitrust Division is a principal advocate of free trade as the cornerstone of American international economic policy. This involves coordination of Division participation in International Trade Commission (ITC) deliberations under the federal antidumping, escape clause, unfair trade or countervailing duty laws. Where appropriate, the Division will seek to maintain the market presence of import competition by advocating that no injury to United States industry by reason of imports be found by the ITC. The Division also fashions our International Trade Competition Advocacy Program to assure that departures from competitive market conditions undertaken pursuant to United States law or policy are confined to the least anticompetitive alternative.

As the Attorney General's representative on the interdepartmental Trade Policy Committee (TPC) chaired by the President's Special Trade Representative, the Division participates in the deliberations of the TPC and its subgroups, the Trade Policy Review Group and Trade Policy Staff Committee.

V. Congressional Relations

The Antitrust Division is very active in congressional activities through its Legislative Unit. The Legislative Unit exists within the Evaluation Section of the Antitrust Division. Created in 1977, the purpose of this Unit is to coordinate all the legislative activity within the Division. The Unit is primarily responsible for the legislative program of the Division, for reviewing and reporting on legislation that would affect the antitrust laws, antitrust enforcement and competition policy. In addition, that office is responsible for coordination with the appropriate congressional committees regarding pending or proposed legislation, coordination and preparation of congressional testimony by Division officials, review of agency reports on proposed legislation, and responses to congressional and White House correspondence.

A. Legislative Program

The Legislative Unit is reponsible for identifying matters of importance to the Antitrust Division that may be amenable to legislative solution, for developing such legislation, and for seeking its enactment. Typically, this process involves substantial coordination with the Assistant Attorney General and his Deputies, the Chiefs of the relevant sections and attorneys in the Evaluation Section. In these and other matters, the Division coordinates its activities with the Department's Office of Legislative Affairs (OLA).

When a legislative proposal is approved by the Assistant Attorney General in charge of the Antitrust Division, it must be reviewed within the Administration for consistency with the Administration's program. This "clearance" process generally is conducted by the Office of Management and Budget (OMB) in coordination with OLA. The process involves circulation of the proposal to various interested Executive Branch agencies including the Domestic Policy Staff in the Executive Office of the President. Once this process has been completed, the proposal is transmitted to the Speaker of the House and the President of the Senate requesting introduction of the legislation. The Legislative Unit is thereafter responsible, in cooperation with OLA, for monitoring the progress of the legislation, including preparation of testimony of Division representatives, reports, responses to inquiries, and general assistance to the congressional staffs as may be requested.

All Division professionals are encouraged to contact their section or office Chief if they become aware of areas in which they believe the law should be modified in order to enhance the antitrust laws, their enforcement or competition policy. Following such discussion, section or office Chiefs should forward a formal legislative proposal, including appropriate background and explanatory information, to the Chief of the Legislative Unit, or should contact that person to further discuss the proposal.

B. Legislative Reports

The Legislative Unit is also responsible for coordination of the Division's views and comments on pending or proposed legislation. Most often, the Department's views are requested by a congressional committee considering legislation or by OMB in establishing an Administration position with respect to such legislation. Such requests are generally made to OLA and referred to the Legislative Unit with a request that the Division either prepare the Department's report or an advisory memorandum to another Division that has been given responsibility to prepare the Department's report. The request is assigned to the appropriate section within the Division, and is accompanied by all relevant materials, including copies of any previous reports that may have been written on similar or related legislation and appropriate instructions as to the nature and format of the report or memorandum to be prepared. Departmental reports generally are prepared for the signature of the Assistant Attorney General for Legislative Affairs while advisory memoranda are prepared for approval by the Assistant Attorney General in charge of the Antitrust Division.

In reviewing proposed legislation, attorneys should consider carefully the potential impact on the antitrust laws, the enforcement of those laws, competition policy and the ongoing mission of the Antitrust Division. While the instruction forms are useful in preparing such reports, it is important that individual attorneys focus their time and attention on those aspects of the proposed legislation that are of most importance to the Division and tailor their reports according to the significance and complexity of the proposed legislation. These reports can be expected to be carefully reviewed by congressional committees, as well as other governmental agencies. They often are printed in the hearings or reports that accompany legislation reported out of Committee, and thereby become part of the bill's legislative history. Accordingly, the reports must articulate the Department's views accurately, completely and concisely.

Upon completion, such reports should be approved by the section or office Chief and returned to the Legislative Unit for review. When approved, they are routed to the Assistant Attorney General through the Deputy Assistant Attorney General for Policy Planning and Legislation and, when the subject matter deals with a regulated industry, through the Deputy Assistant Attorney General for Regulatory Activites.

Once a legislative report is completed, it generally is sent to OMB for review for consistency with the Administration's program. When this process has been completed, the report is transmitted to the appropriate committee. The Legislative Unit, in cooperation with OLA, continues to monitor the status of the report and the proposed legislation. Division personnel having questions concerning preparation of reports or the status of proposed legislation should contact the Chief of the Legislative Unit or the staff of that Unit.

Essentially the same procedure is followed in preparing a Departmental report or an advisory memorandum on an enrolled bill, i.e., a bill that has been passed in identical form by both Houses of Congress and has been submitted to the President for action. These assignments must be completed and returned to OLA within 24 hours and are accompanied by special instructions.

C. Related Legislative Activities

The Legislative Unit is also responsible for coordinating a variety of other legislative and congressional activities. These include reviewing proposed legislation, testimony and reports to various congressional committees prepared by other Executive Branch agencies for consistency with the Administration's program. In addition, it often participates, in coordination, with OLA, on OMB and Administration task forces or study groups engaged in special projects that may involve attempts to develop legislative proposals.

D. Congressional and White House Mail

The Legislative Unit is responsible for coordinating responses to all congressional and White House mail referred to the Antitrust Division. Congressional and White House mail is acknowledged by the Legislative Unit and assigned to appropriate Division sections for preparation of a response.

This correspondence is regarded as a priority matter and should be answered within the short deadlines that are assigned. Responses should be prepared for the signature of the Assistant Attorney General. While there is no one correct form, responses should be courteous and responsive to the individual matter or matters raised in the correspondence. While the Division is not able to render legal advice, in many instances we are able to provide information to members of Congress, their constituents and the general public that will be of assistance to the person initiating the request. Such responses must always be prepared carefully so as to be consistent with Departmental guidelines, especially those involving the amount of information that can be disseminated concerning matters that may currently be before the courts or under investigation. See Division Directive ATR 3000.1 "Communications on Current Investigations and Cases with Outside Parties."

Responses to congressional and White House mail should be approved by the section Chief and forwarded to the Legislative Unit for review. When approved, such responses generally are routed to the Assistant Attorney General through the Deputy Assistant Attorney General for Policy Planning and Legislation, although in some instances, these responses may be reviewed by other Division officials as well.

All congressional mail should be coordinated through the Legislative Unit. In the event that such mail is received directly by Division attorneys in Washington sections or in the field offices, the Unit should be notified immediately and instructions sought on preparation of a response.

E. Informal Congressional Inquiries

The Division receives many informal telephone inquiries from members of congressional committee staffs, the staffs of individual members of the Senate and House, and numerous other sources. Inquiries from congressional sources must be directed to the Deputy Assistant Attorney General for Policy Planning and Legislation or the Chief of the Legislative Unit, and will be handled by them. Accordingly, individuals in the Division should refer such calls to either of those persons in order that the Division may be aware of the nature and extent of such inquiries and be able to maintain a consistent and uniform policy or response. If there is a situation where a Division attorney or economist has occasion to discuss matters of interest to the Division with members of congressional or committee staffs, the Deputy Assistant Attorney General for Policy Planning and Legislation or the Chief of the Legislative Unit should be informed of the nature and content of the communication. See Division Directive ATR 3000.1 "Communications on Current Investigations and Cases with Outside Parties, 4(c).

F. Resources

The Legislative Unit draws primarily upon the resources of the entire Division and especially upon the three regulatory sections -- Energy, Transportation, and Special Regulated Industries -- since many legislative proposals tend to involve regulated industries. In addition, it draws heavily upon the Chief, Assistant Chief and attorneys in the Evaluation Section, as well as the Director and Deputy Director of Operations and the Special Assistants in the Office of Operations.

The Legislative Unit has a variety of resources available to assist attorneys working on legislative matters, including the Congressional Monitor, Congressional Record, the Congressional Quarterly and the Weekly Compilation of Presidential Documents. The Unit's extensive file system can be an extremely useful device in researching the Division's participation in past legislative initiatives. In addition, the Office of Legislative Affairs provides valuable assistance and support in connection with Division participation in legislative and interagency matters, as well as in monitoring the status of proposed legislation.

All Division professionals are encouraged to utilize the resources of the Legislative Unit and to contact Unit personnel whenever they need information or have questions about legislative matters.

VI. Freedom of Information Act Requests and Procedures

A. Organization

Since the passage of the Freedom of Information Act (FOIA), 5 U.S.C. § 552, citizens, public interest groups, corporations, and other entities have been provided access to various categories of governmental information unless access is specifically limited by one of the exemptions to the Act. In response to the Act, the Department of Justice has established Freedom of Information Act Offices in its various organizational entities, including the Antitrust Division. Final determinations of FOIA matters within the Antitrust Division are made by the Deputy Assistant Attorney General for Litigation. The final Departmental responsibility for making a determination relating to the Act generally rests with the Associate Attorney General's Office.

The Antitrust Division's Freedom of Information Act Office is staffed by a Freedom of Information Act Officer, paralegals and support personnel. It is located in the Legal Procedure Unit of the Division and is under the supervision of the Office of Operations.

B. Procedures

Freedom of Information Act requests that relate to the work of the Antitrust Division are immediately forwarded to the Division's FOIA Office for processing. Because of the large number of FOIA requests the Division receives, a substantial period of time usually is required for processing such requests. It should be noted that the requestor of the information is generally responsible for the cost of reproduction of the materials requested.

Often, attorneys in the Division who have worked on a particular matter are consulted about materials that were part of the investigative files requested for Freedom of Information Act disclosure. Attorneys who are consulted by the FOIA Office should act expeditiously and provide the maximum amount of assistance possible to that Office.

Division attorneys who directly receive Freedom of Information Act requests either by telephone or in person should advise the requestor to contact the Freedom of Information Act Officer of the Antitrust Division. The request should be in writing and should state as specifically as possible the title of the investigation and the materials requested. Attorneys receiving such calls should immediately notify the Division's FOIA Office of the request to expedite processing of such requests to whatever extent possible.

C. FOIA Exemptions

Generally, everything in federal agency files is available to the public under the Freedom of Information Act, except for nine categories of exempt information. The application of these exemptions generally is discretionary and much information falling within their scope is released to the public.

The exemptions to the Freedom of Information Act are:

Exemption 1 -- Classified Documents

This exemption covers national security information which has been properly classified under the standards and procedures of Executive Order No. 12065. Such classified documents can only be processed by employees in the FOIA Office with the appropriate security clearance.

Exemption 2 -- Internal Personnel Rules and Practices

This exemption has been interpreted by most courts to apply only to internal agency matters where there is no substantial and legitimate public interest in their disclosure, such as procedures for obtaining parking spaces or determining cafeteria hours. There is some authority that this exemption applies to internal agency instructions to investigators that reflect confidential investigatory techniques and procedures, the disclosure of which would hamper the detection of violations of the law.

Exemption 3 -- Materials Exempted by Other Statutes

This exemption relates to two statutory areas that the Division encounters on a regular basis: 15 U.S.C. § 1313(C) (information submitted pursuant to a Civil Investigative Demand) and Rule 6(e) of the Federal Rules of Criminal Procedure (grand jury secrecy). Not only are the actual documents or testimony received pursuant to the CID or grand jury withheld from disclosure, but excerpts from and descriptions of such documents and testimony as they appear in transmittal letters and internal memoranda are also exempt. Copies of actual CID requests generally are released, while copies of grand jury subpoenas and immunity requests are released only when they have been placed in a public file by the appropriate court. Copies of grand jury documents and transcripts are relased only when they have been introduced into evidence at a criminal trial or when the party has obtained such release from a Federal District Court, pursuant to Rule 6(e).

Exemption 4 -- Confidential Business Information

This exemption covers trade secrets and other confidential business information furnished to an agency from outside the government. While a promise of confidentiality by an agency requesting the commercial information is pertinent in applying the exemption, it is not always dispositive. Most courts have interpreted the exemption to cover either commercial information that would not have been obtained absent a promise of confidentiality or commercial information that would cause the submitting parties substantial competitive harm.

Often, this exemption area is one where the FOIA Office will consult with staff attorneys and economists to determine the nature of the information and whether it is exempt under the Act. The FOIA Office *always* should be consulted before any promises of confidentiality are given to parties from whom we have requested information. See Chapter III, *supra*.

Exemption 5 -- Attorney Work Product

This exemption applies to interagency or intra-agency memoranda or letters which would not be available by law to a party.

This exemption covers communications that would be covered by the attorney-client, attorney work product, or government privileges. The exemption normally does not apply to essentially factual information contained in internal communications unless the factual information is so intertwined with the analysis or so clearly reflects the internal deliberative process employed by the agency as to make segregation of factual portions impossible.

The exemption applies to documents prepared by Division employees as well as to documents prepared by outside expert consultants. In these instances, the age of the document and the extent to which information and analysis in the document has been made public are important considerations in whether the document is withheld under the Act.

It should be noted that an important caveat in the application of Exemption 5 is the requirement that "each agency . . . shall make available for public inspection -- (A) final opinions . . . made in the adjudication of cases." 5 U.S.C. § 552(a)(2)(A). See, *Sears, Roebuck & Co.* v. *NLRB*, opinions and any documents incorporated by reference in such final opinions must be made public regardless of the exemption under the Act. However, the Supreme Court expressly declined to decide whether a prosecutor's decision not to file a case or seek an indictment is a final opinion. As such, a case-by-case determination is usually necessary.

Exemption 6 -- Materials that Involve Invasion of Personal Privacy

This exemption involves matters such as personnel, medical, and similar files which would cause an unwarranted invasion of personal privacy. It is sometimes necessary to invoke this exemption where the intimacy of the information in the files or the possible adverse effects upon the individual and his or her family are clear. In applying this exemption, the Division balances the public interest of disclosure against the invasion of privacy the disclosure of the information will cause.

Exemption 7 -- Investigatory Records

Exemption 7 exempts non-public documents relevant to an open and active investigation or case. This often involves a document-by-document justification for withholding disclosure. This exemption may also be applied to closed files where those files are now relevant to another open investigation or case. Exemption 7 also exempts materials that would deprive the person of a right to a fair trial or an impartial adjudication as well as those which would constitute an unwarranted invasion of personal privacy similar to that described in Exemption 6.

Exemption 7(D) involves the disclosure of the identity of a confidential source or confidential information furnished in a criminal investigation only by that source. This protects the identity of confidential sources, but not necessarily the information furnished except to the extent that the information could be used to identify the confidential source. The exemption relates to criminal and lawful national security intelligence investigations and permits the withholding of both the sources' identities and the confidential information supplied.

Sources are considered confidential if they request an express promise of anonymity or if they have provided information in circumstances where the assurance of confidentiality may be reasonably inferred. This exemption applies not only to real persons but also to corporations, trade associations, domestic and foreign governments, and law enforcement sources.

Exemptions 8 and 9 -- Financial Records and Geological and Geophysical Information

These exemptions respectively cover records relating to examination of banks and other financial institutions by agencies that supervise them and records containing oil well information, together with other types of geological information. They generally are not issues that arise in an antitrust context.

D. Other Information Not Subject to FOIA

In addition to the nine exempted areas under the Freedom of Information Act, three other types of records are not subject to the Act. These are:

1. Personal Papers

Personal papers of individuals are not the subject of a proper Freedom of Information Act request and are exempt. Such personal papers include documents and information that the individual maintains for his own private use and are not part of the official record of any investigation or case. See, Division Directive ATR-2710.1 "Maintenance, Destruction, and Removal of Antitrust Division Documents."

2. Grand Jury Records

Most courts have held that grand jury materials are not subject to the Freedom of Information Act and may only be disclosed if the court releases them from the confidentiality requirements of Rule 6(e). This problem generally arises in the course of treble damage litigation and 4F requests by the states. In those situations, the Division must make an independent determination of what position to take regarding a request for various types of grand jury information.

3. Records Subject to Court-Ordered Protective Orders

Where records are placed under court-ordered protective orders, they generally are not subject to the Act and may only be released upon application to the court. As with grand jury information, the Antitrust Division must determine its response on a case-by-case basis.

E. Antitrust Division Records Maintenance and Procedures

Antitrust Division attorneys, economists, and paralegals should always carefully review materials that are placed in official files of the Division to determine that they are official records and are properly within those files.

If it is clear to the attorney at the time the record is made or placed in the file that it would involve confidential information or material that would be exempt from the Freedom of Information Act, it would be appropriate to make a notation on the document at the time it is placed within the Division files stating that the document is "FOIA sensitive." This will assist the Freedom of Information Act Office in determining whether the document comports with a proper exemption or is not otherwise subject to the Act. When confidentiality agreements are made under the terms and conditions outlined above, such agreements should be placed in the file in writing to make those reviewing the files for FOIA purposes aware of the circumstances and the reasons for such confidentiality.

Consistent with the Division's commitment to release information under FOIA that is relevant to the request and that does not fall within a specific exemption or is not subject to the Act, attorneys, economists, and paralegals should be familiar with the Division's directive relating to document retention and destruction. See, Antitrust Division Directive ATR-2710.1.

If any other questions arise as to a proper application of the Freedom of Information Act, or commitments regarding the Freedom of Information Act, Division personnel should confer with the Division's Freedom of Information Act Officer.

VII. Relationships with the News Media

The Antitrust Division generally communicates with the media through the Department's Public Information Office. An Assistant Director of Public Information is assigned to handle all antitrust matters and close liaison is maintained with that Assistant Director, and the entire Office, through the Assistant Attorney General, the Deputy Assistant Attorneys General, and the Office of Operations. Where appropriate, the Public Information Office may contact a section or field office Chief or an attorney to obtain specific information about a matter. The Chief or attorney contacted should provide clarifying information to the Public Information Office and should point out whatever information is sensitive or cannot be released publicly, and the reasons for such practice.

A. Press Releases

The Division communicates with the media through the issuance of press releases describing significant matters such as case filings, business review letters, consent decrees, regulatory filings, and important administrative and policy decisions of the Division. When sending forth a recommendation or pleadings for action, the staff attorneys who are responsible for a particular matter should send a press release to the Office of Operations or the Deputy Assistant Attorney General for Regulatory Activities, as appropriate. Press releases reviewed by Operations are then sent to the Deputy Assistant Attorney General for Litigation or the Deputy Assistant Attorney General for Regulatory Activities, as appropriate. The press release is reviewed and modified, if necessary, and the final approved copy is sent by the appropriate Deputy Assistant Attorney General to the Public Information Office with a copy simultaneously sent to the Deputy Assistant Attorney General for Policy Planning and Legislation. The Assistant Director of the Public Information Office who handles Antitrust Division matters will determine whether any change or clarification is necessary, and discuss the matter with the appropriate source within the Division. The Division's procedures are set forth in Division Directive ATR 3000.1, "Communication on Current Investigations and Cases with Outside Parties".

The proposed press release should be received by the Deputy Assistant Attorney General, and the Public Information Office, at least two business days before it is scheduled for release when possible. The timing of the release should also be made known to the Public Information Office at the time the release is sent to that Office or as soon as the information is available.

When an indictment, civil case or consent decree is publicly filed, the attorney immediately should call the Office of Operations and inform the Office of the filing. Operations will then inform the Public Information Office that the press release should be issued. The attorney handling the matter should not call the Public Information Office to authorize release of a press statement.

The Division employs standard press statements relating to the return of indictments, filing of civil cases, termination of cases by consent decree, and issuing business review letters. Samples of various types of press releases follow:

1. Criminal Indictment Press Release

A federal grand jury in New York, New York, today returned a felony indictment charging five corporations and two individuals with conspiring to fix prices and to allocate customers for the sale of widgets in the United States.

Attorney General Benjamin R. Civiletti said the indictment and a companion civil suit, both charging a violation of Section 1 of the Sherman Act, were filed in U.S. District Court in New York.

Named as defendants are:

-- Company X, New York, New York;

-- Company Y, Philadelphia, Pennsylvania; and its President, John Jones;

-- Company Z, Boston, Massachusetts;

-- A Corporation, Chicago, Illinois; and its President, John Smith; and

-- Widgets Company, New York, New York.

John H. Shenefield, Assistant Attorney General in charge of the Antitrust Division, said the indictment charges that beginning in 1968 and continuing to 1979, the defendants and co-conspirators conspired to fix prices and allocate customers for the sale of widgets in the United States.

Widgets are used for the manufacture of buildings and in automobiles. According to the indictment, virtually all widgets sold in the United States are sold by the corporate defendants. Total sales of the defendant companies in 1979 totalled $2 billion.

The civil suit names the five indicted corporations as defendants. It seeks injunctive relief based on the allegations in the indictment.

The maximum penalty upon conviction of felony price fixing is a fine of $1 million for a corporation and a fine of $100,000 and 3 years imprisonment for an individual.

# # #

2. Merger Complaint Press Release

The Department of Justice today filed a civil antitrust suit challenging the proposed acquisition of Company X of Washington, D.C. by Company Y of New York, New York. Both companies are major domestic manufacturers of widgets.

Attorney General Benjamin R. Civiletti said the suit was filed in U.S. District Court in Washington, D.C.

The complaint charges that the proposed transaction would violate Section 7 of the Clayton Act. It asks that the parties be enjoined from consummating the proposed acquisition pending trial of the case.

John H. Shenefield, Assistant Attorney General in charge of the Antitrust Division, said only six firms manufacture widgets in the United States, and the four largest firms controlled 90.0 percent of total domestic production capacity in 1979. Company X is the second largest manufacture of widgets in the United States. Company Y ranks fourth.

Widgets are mainly used for the manufacture of buildings and in automobiles.

According to the complaint, Company X had widget sales of $200 million in 1979. Company Y's widgets division had sales of $100 million in 1979.

The complaint alleges that the proposed acquisition will eliminate competition between Company X and Company Y in the manufacture and sale of widgets and will increase concentration in the manufacture of widgets in the United States.

# # #

3. Business Review Letter Press Release

The Department of Justice today announced it did not intend to challenge a proposal by [X Company to set up the program that is the subject of the Business Review].

The Department's position was stated in a letter signed by John H. Shenefield, Assistant Attorney General in charge of the Antitrust Division, to [attorney] for X Company of New York, New York, which proposes to establish the program.

X Company had asked the Department for a Business Review letter stating the Department's enforcement intention if the firm carried out its proposal.

Under the proposed program, [a brief description of the proposed activity].

Under the Department's Business Review Procedure an organization may submit a proposed action to the Antitrust Division and receive a statement as to whether the Division would challenge that action under the antitrust laws.

A file containing the business review request and the Department's response will be made available to the public immediately and may be examined in the Legal Procedure Unit, Antitrust Division, Room 7416, Department of Justice, Washington, D.C. 20530. After a 30-day waiting period, the documents supporting the business review will be added to the above file.

[A copy of the signed Business Review Letter will be attached to the Press Release.]

# # #

4. Consent Decree Press Release

The Department of Justice today filed a proposed consent decree that would terminate its civil antitrust suit against five widget manufacturers.

Attorney General Benjamin R. Civiletti said the proposed decree, which was filed in U.S. District Court in New York, will become final upon approval by the court.

The defendants in the suit are: Company X, New York, New York; Company Y, Philadelphia, Pennsylvania; Company Z, Boston, Massachusetts; A Corporation, Chicago, Illinois; and Widgets Company, New York, New York.

John H. Shenefield, Assistant Attorney General in charge of the Antitrust Division, said the civil suit, which was filed on January 2, 1979, alleged that the defendants had violated the Sherman Act by conspiring to fix prices throughout the United States.

Mr. Shenefield said the civil suit had been brought as a companion case to a criminal felony indictment charging the same conspiracy against the five corporations and two of their officers.

All the defendants except Company Y and the two individuals entered no contest pleas. The other three defendants were found guilty in a jury trial on June 27, 1979. A total of $2,400,000 in fines were imposed on the corporations and individuals, and the two individuals were each sentenced to six months imprisonment.

The proposed decree would enjoin the defendants from conspiring to fix prices and exchange price information among themselves. It further establishes that each corporate defendant must establish an antitrust compliance program and submit such program to the Court within 60 days.

In accordance with the Antitrust Procedures and Penalties Act of 1974, a competitive impact statement regarding the decree has been filed with the court. Copies of this statement and of the proposed decree are available on request in the Legal Procedure Unit, Room 7416, Department of Justice, Washington, D.C. 20530. They are also available for inspection in the Office of the Clerk of the United States District Court in New York.

Comments to the Department and to the Court regarding the decree are invited from members of the public within the next 60 days. They should be directed to John Smith, Chief, Litigation Section, Antitrust Division, Department of Justice, Room 3200, Washington, D.C. 20530.

# # #

5. Regulatory Activities Press Release

While press releases concerning regulatory filings, reports and other forms of competition advocacy differ from situation to situation, the following form of press release is a typical example of the Division's press release format. Press releases concerning regulatory activities are approved by the Deputy Assistant Attorney General for Regulatory Activities.

The Department of Justice today asked the Federal Energy Regulatory Commission for permission to participate in a proceeding to determine the legality of a system of rates proposed by Regulated Company X.

Regulated Company X has announced plans to [build or license a certain facility].

In its petition to intervene, the Department said the system of charges for use of the planned facility will have important consequences for competition in the petroleum industry. Under the antitrust laws, the Department of Justice has the responsibility of protecting and promoting competition.

To build the facility, Regulated Company X must receive a license from [a federal agency] under [a statutory scheme]. Regulated Company X initiated the proceeding before the Regulatory Commission to obtain advance approval of its proposed rate structure.

The Commission has jurisdiction over the rates charged by [such facilities] and the [federal agency] insisted on such approval before it would issue the license.

Regulated Company X's proposal includes [give a very brief description of the activity].

In its petition, the Department of Justice took the position that this type of [conduct] is presumptively legal if found to be just and reasonable, nondiscriminatory and not unduly preferential. However, the Department did not take a position as to whether Regulated Company X does, in fact, meet those standards.

# # #

B. Press Inquiries and Comments to the Press

It is the policy of the Department of Justice and the Antitrust Division that public out-of-court statements regarding investigations, indictments, ongoing litigation, and other activities should be minimal, consistent with the Department's responsibility to keep the public informed.

Because charges that result in an indictment or a civil action should be argued and proved in court, and not in a newspaper or broadcast, public comment on such charges should be limited out of fairness to the rights of individuals and corporations and to minimize the possibility of prejudicial pre-trial publicity.

Division attorneys should be familiar with the provisions of Division Directive ATR 3000.1 "Communications on Current Investigations and Cases with Outside Parties;" 28 C.F.R. § 50.2: "Release of Information by Personnel of the Department of Justice Relating to Criminal and Civil Proceedings," and "Public Comments by Department of Justice Employees Regarding Investigations, Indictments, and Arrests," issued by the Director of Public Information and approved by Attorney General Bell on July 21, 1979, and adhere to them in both letter and spirit.

To ensure that the overall Departmental policy is consistent and known by all, the following summarizes the policy considerations that should be followed:

1. Absent unusual circumstances, news conferences should not be held to announce investigations or indictments.

2. Information about investigations, indictments, and civil cases should be provided equally to all members of the news media subject to specific limitations imposed by law or court rule or order. Written releases relating to the essentials of the indictment, complaint or other pleadings are usually prepared and distributed as outlined in Section A, *supra*.

Any other comments that need be made on a particular investigation or series of investigations should be handled through the Public Information Office or by the appropriate Deputy Assistant Attorney General or the Office of Operations. Attorneys should not take it upon themselves to make such comments to the press or even release the identity of staff members or others involved in the course of the investigation.

3. Generally, not even the existence of particular criminal investigations should be acknowleged or commented upon. Where the Antitrust Division has undertaken an investigation or inquiry as a result of a referral from another agency or individual, and that agency or individual has publicly said that such referral has been made, the Department, upon inquiry, may acknowledge the existence of the investigation.

4. In antitrust investigations, reference to the name of an individual or particular company should be subject to the Department's general "no acknowledgment" rule except in merger investigations (see 5, infra). Investigation of overall industry or market practices may be acknowledged by the Public Information Office, the appropriate Deputy Assistant Attorney General, or the Office of Operations. E.g., the Antitrust Division is conducting an investigation into the marketing practices of the widget industry.

5. In situations involving filings made under the Hart-Scott-Rodino Pre-merger Notification rules, the Antitrust Division will not disclose the fact that companies have filed under the Act. Typically, an Antitrust Division response to a specific question about a proposed acquisition would be that either the Division or the Federal Trade Commission would look at any acquisition of major size or significance to the American economy. A Division attorney should never comment further.

6. In virtually every instance where a Division attorney or other representative receives a press inquiry, he or she should not personally comment on the practice or activity. Such calls should be referred to either the Public Information Office of the Department (633-2014), the Division's Office of Operations or the appropriate Deputy Assistant Attorney General, who will handle the matter.

In general, the Antitrust Division and the Department have a policy of openness, fairness, decency and civility to all. The Division does not wish to prejudice the rights or affect the interests of anyone accused of a crime or a civil violation of the law. Accordingly, press relations should be based on a common sense view of the guidelines set forth herein.

VIII. Citizen Calls and Complaints to the Antitrust Division

Among the responsibilities of Division personnel is that of answering calls and letters from citizens who are complaining to the Division, offering information or seeking it. The following principles should guide Division personnel in responding to citizen calls and letters.

A. Division personnel answering citizen telephone calls, usually attorneys or paralegals, should identify themselves as such and encourage the caller to communicate his or her information with the knowledge that the Division will give it careful consideration. In the case of calls requesting information, the recipient should endeavor to answer the request subject to specific limitations. See Division Directive ATR 3000.1 "Communications on Current Investigations and Cases with Outside Parties."

B. All calls and letters should receive attention even though many will advance complaints and information of no significance to antitrust enforcement. When Division personnel recognize that another law enforcement or other agency is responsible or may be interested in the complaint, the caller or correspondent should be referred to that agency. For this reason, Division personnel should be familiar with other agencies and should have appropriate addresses and phone numbers available. See, e.g., United States Government Manual. Division personnel should be aware of the address and telephone number of the nearest regional office of the Federal Trade Commission. A listing of the FTC offices appearing in the Division's consumer publication "Antitrust Enforcement and the Consumer." Many calls that do not indicate violations of laws enforced by the Division still may indicate trade practices policed by the FTC. See Section I, supra. The Division frequently can forward valuable information to other law enforcement agencies and should do so.

C. Telephone callers who offer information on the condition that they not be asked their identity should be accommodated. Experience has shown that after the caller has an opportunity to become acquainted with the recipient of the call, the caller often is willing to be identified and even to meet with Division personnel. In any event, callers requesting anonymity should be advised that it will be helpful if they identify themselves in some way, and give an address or phone number where they may be contacted in the future.

D. Division personnel should elicit as much information as possible when it becomes clear that the call may have some antitrust significance. The parties involved, line of commerce, the area, the nature and specific incidents of alleged violations should be noted in such cases with as much detail as Division personnel would seek in an interview initiated by them. Orderly notes from calls should be kept. Fragmented information and cursory complaints sometimes prove significant in light of information later brought to the Division's attention.

E. If a call or letter has some significance to antitrust enforcement, the citizen should be encouraged to submit any documents or other material which may illustrate the complaint. The caller or correspondent should be advised that such documents will be returned if he or she wishes. Callers and correspondents should also be encouraged to contact Division personnel at any point at which he or she discovers more information.

F. If the call has some antitrust significance, the recipient should consult the ACES reports and other files (see Chapter VI) to determine whether the information may be of immediate use to any other Division section or field office, to a U.S. Attorney, or state attorney general.

G. Some callers or correspondents may seek advice on business decisions in the belief that their decisions may help or hinder the Division in its investigation or a later prosecution. In all events, such callers should not be advised on how to conduct their business and should be advised that only private counsel may provide such advice.

H. Division personnel should never counsel callers or correspondents on any matter or render opinions as to the legality or illegality of any practice. See Division Directive ATR 3000.1(4)(d). Only the most general description of the antitrust laws or references to cases already brought are proper responses to citizen inquiries seeking the Division's views of specific practices. Callers and correspondents may be referred to any literature on the subject which may be helpful, including the Division publication "Antitrust Enforcement and the Consumer," which may be sent to the citizen with a brief letter.

I. Citizens and businessmen who want Division clearance of proposed activity may be advised that the Division has a Business Review Procedure. Information concerning the manner of requesting a Business Review should be provided to the caller or correspondent. See Chapter III, Section VII.

J. Citizens frequently ask what will happen to information they give the government over the phone or by letter. Unless it is obvious that the information should be referred to another agency or does not relate to any matter for which the Division has responsibility, the proper response is that the information will be considered by the Division in light of the laws it is charged with enforcing. Citizens should be advised that even information of possible antitrust significance may not result in the bringing of an antitrust prosecution, because the evidence is not legally sufficient or because a prosecution is otherwise barred by law. Finally, Division personnel should not promise to keep citizens advised of the status or outcome of any investigation. Likewise, call recipients should never advise citizens that any particular action will be taken by the Division.

It is a good practice to acknowledge citizen complaints and information. Brief letters indicating one of the following responses are appropriate:

(1) the Antitrust Division believes that the information disclosed by the citizen may have antitrust significance and is studying it, and the citizen may be assured that the Division will take whatever action is warranted;

(2) the Division believes the complaint may indicate a violation of laws other than those enforced by the Division and hence the citizen's information is being referred to the U.S. Attorney, the state attorney general, the FTC, or some other agency;

(3) the Division believes that the citizen's information does not relate to any law enforced by the Division but that the citizen should contact another law enforcement agency which the letter identifies; or

(4) the Division finds that the complaint does not disclose a violation of the antitrust laws and does not appear to indicate a violation of the law.

All letters should state that the Division nonetheless appreciates the caller's or the correspondent's interest in the enforcement of the antitrust laws.

K. Division personnel receiving citizen complaints and calls should bear in mind that citizens have a right to advise the Department of Justice of information they believe may assist in the enforcement of the antitrust laws and that while many citizen contacts do not advance the enforcement of the antitrust laws directly, some will. Every citizen call and letter should be treated with courtesy and should receive consideration.

IX. Relationships with Client Agencies

The divisions and offices of the Department of Justice, including the Antitrust Division, represent other federal agencies which are the clients of the Department of Justice. Most significantly, the Antitrust Division engages in client relationships with other federal agencies through the activities of the Appellate Section and the Consumer Affairs Section. There are, however, other situations where Division attorneys may be in a position to provide legal assistance and counsel to client agencies of the Antitrust Division.

A. Appellate Section and Consumer Affairs Section Relationships with Client Agencies

The Appellate Section and the Consumer Affairs Sections have a well developed set of procedures that govern their relationship with client agencies. Under the client agency arrangements which the Division has established, the Antitrust Division is required to comply with the following procedures at a minimum:

1. The Division should promptly, upon receipt of a matter involving the agency, mail a notification letter to the general counsel of the agency or the counsel's designee. When time is of the essence, notification should be by telephone. Similarly, the general counsel of an agency should inform the Division as soon as possible of any matter in which the Division will represent the agency.

   At the same time or as soon thereafter as possible, the agency should be provided with the names, direct mailing addresses, and telephone numbers of Division attorneys to whom the case has been assigned. The agency should be requested, in turn, to provide the Division attorneys with the names, direct mailing addresses, and telephone numbers of the agency attorneys to whom communications should be directed.

2. Copies of all significant documents filed in court and other memoranda should be sent immediately upon receipt, service, or preparation to the client agency.

3. The agency should always be notified in advance of any significant hearings or arguments, depositions, or other proceedings that relate to its interest in the matter.

4. The Antitrust Division should always consult with agencies in advance regarding the position the Division intends to urge in court. Under no circumstances should any case be compromised or settled without advance consultation with a client agency unless the agency has clearly indicated that some other procedure would be acceptable.

B. Client Relationships Concerning Antitrust Damage Cases

There are a number of situations where the Division undertakes a significant role in filing a damage case on behalf of another federal agency. When the government is defrauded through price fixing or bid rigging, the Division may develop a significant damage claim on behalf of a federal agency.

When a staff is contemplating such a damage action under Section 4A of the Clayton Act, 15 U.S.C. § 15(a), it should notify the agency in question and work in close liaison with the attorneys and purchasing agents of that agency. As noted above, the Division should always consult with and make determinations in conjunction with the agency before filing, litigating, compromising, or settling a case.

The Division often is required to give advice to agencies that receive notifications of class action settlements or determinations involving products or commodities they purchase. In these situations, the Office of Operations should be consulted and the agency should be informed that it cannot participate in a private treble damage action under Section 4 of the Clayton Act, 15 U.S.C. § 15. When asked about these notices, the Division ordinarily should reply to the agency that it may not participate in the settlement since government agencies are barred by statute 1/ and case law from participating in treble damage actions. United States v. Cooper Corp., 312 U.S. 600

1/ A private plaintiff's counsel has no authority to represent the United States in an antitrust damage action. Litigation in which the United States is a party is conducted by attorneys of the Department of Justice, under the direction of the Attorney General. 28 U.S.C. § 516.

(1941). In addition, the Division attorneys should inform the agency that, in the event the agency believes it has suffered damages pursuant to the price fixing or bid rigging arrangement, either the Antitrust Division or the Civil Division will investigate any damage claim under the single damage provisions of Section 4A of the Clayton Act, 15 U.S.C. § 15(a), or the double damages and forfeiture provisions of the False Claims Act, 31 U.S.C. §§ 231, *et seq.*

Other types of questions by the General Counsel's Office of client agencies to a particular section or field office should be referred to the Office of Operations or to the appropriate Deputy Assistant Attorney General. When the question involves a litigation matter, the Office of Operations should be consulted.

C. Reports of Client Agency Matters

The Division is committed to establishing and fostering the best possible relationships with client agencies. When the Division files suit or concludes a suit on behalf of a client agency, the Special Assistant to the Assistant Attorney General who prepares the weekly and monthly reports should be informed of such action and will report it on the weekly report to the Associate Attorney General and on the monthly report to the Attorney General.

CHAPTER VIII

BIBLIOGRAPHIC AND SOURCE MATERIALS

This Chapter is intended to provide a helpful guide to various Division resources in the form of testimony and bibliographic aids to antitrust investigations. Part I of this Chapter lists the file of expert economic testimony that is maintained in the Economic Policy Office. Part II will list a major bibliography of antitrust and related literature, including materials that will assist in developing trial advocacy skills.

I. Contents of the Economic Witness File

The Economic Policy Office maintains a file of the testimony, statements and affidavits of expert economic and statistical witnesses in Division cases and regulatory proceedings and in private litigation (See Chapter VI, Section I (E)).

The contents of the file are listed by type of case or proceeding and are divided into the following categories: (A) Sherman Act Section 1 Cases; (B) Sherman Act Section 2 Cases; (C) Clayton Act Section 7 Cases; (D) Regulatory Proceedings; and (E) Miscellaneous Cases.

In addition to the type of matter, the name of the expert, the case and the date, the list also notes the type of material found within the file. Under the heading "Type", "T" indicates testimony; "S" indicates statement; "A" indicates affidavit; and "D" indicates deposition. An asterisk (*) identifies the testimony as that of a defense witness or other adverse witness subject to Division cross examination.

Access to copies of specific testimony may be obtained from the Deputy Director of the Economic Policy Office on the 10th Floor of the Star Building.

A. Sherman Act Section 1 Cases

Expert	Matter	Type	Date
Barber, Richard J.	U.S. v. Armco Steel Corp., et al.	T	Oct. 1974
Barnes, Irstin R.	U.S. v. Topco Associates, Inc.	T	Mar. 1979
Christensen, Rondo	U.S. v. Countryside Farms, Inc., et al.	T	
Eisenstat, Philip M.	U.S. v. Mid-American Dairymen, Inc.	T	
Kamerschen, David	U.S. v. Empire Gas	T	Apr. 1, 1974
Lubeck, Alvin S.	U.S. v. Archer-Daniels-Midland	T	Nov. 1978

Expert	Matter	Type	Date
Mancke, Richard *	U.S. v. International Paper Co.	T	Apr. 1979
Max, Peter *	U.S. v. Continental Group, Inc., et al.	T	Nov. 1977
Max, Peter *	U.S. v. International Paper Co.	T	Apr. 1979
Pace, Norma *	U.S. v. International Paper Co.	T	Apr. 1979
Somers, Herman*	U.S. v. The American Society of Anesthesiologists, Inc.	T	Dec. 1978
Tolton, Julius H.	U.S. v. Continental Group, Inc., et al.	T	Oct. 1977
Tolton, Julius H.	U.S. v. George K. Landon, Jr., et al.	T	June 1978

B. Sherman Act Section 2 Cases

Expert	Matter	Type	Date
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C. Clayton Act Section 7 Cases

Expert	Matter	Type	Date
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Houthakker, Hendrik	U.S. v. Amax Copper	T	
Hoven, John T.	U.S. v. Revco D.S., Inc., et al.	T	Mar. 26, 1976
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Phillips, Almarin	U.S. v. Times-Mirror	T	

Expert	Matter	Type	Date
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Ritchin, Hyman	U.S. v. Healthco	T	May 5, 1978
Roberts, Marc J.	U.S. v. United Technologies Corp.	T	Aug. 1977
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D. Regulatory Proceedings

Baumol, William J.	Thill Securities Corp. v. N.Y. Stock Exchange	T	Sept. 21, 1972
Chanowitz, Gerson	Navajo Freight Lines, Inc.; Garrett Freightlines, Inc. (ICC)	S	
Demsetz, Harold	Thill Securities Corp. v. N.Y. Stock Exchange	T	Oct. 3, 1972
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Hurdle, Gloria J.	Steel Carriers' Tariff Association (ICC)	S	Nov. 1978
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II. Bibliography

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The Division Librarian should be consulted if an attorney or economist is attempting to find a certain text or materials on specific topics.

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